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Supreme Court, U. S.
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No. 1345

In the Supreme Court of the United States

OCTOBER TERM, 1946

FLOY K. WILLIAMS ET AL, APPELLANTS

vs.

RAILROAD COMMISSION OF TEXAS ET AL, APPELLEES

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE JUDGMENT OF THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Floy K. Williams, D. F. Williams, L. A. Bryan, Jr., Jack Kay, Paul D. Smith, R. L. Peveto, Florence Cowles Hamlett and A. L. Atkins, appellants, complying with Rule 12, submit this jurisdictional statement, particularly disclosing the bases upon which it is contended that this Court has jurisdiction to review this cause on appeal from the final judgment entered herein by the Court of Civil Ap-

peals for the Third Supreme Judicial District of Texas, sustaining an order or rule promulgated by the Railroad Commission of Texas and herein challenged as being repugnant to the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully shown.

I.

STATUTORY PROVISIONS SUSTAINING JURISDICTION

1. This Court has jurisdiction of this appeal under Section 237(a) of the Judicial Code, as amended, (U.S.C.A., Title 28, Section 344) which provides that:

> "(a) a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, * * * where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error" * * *.

2. Pursuant to the Act of January 31, 1928 (45 Stat. 54; U.S.C.A., Title 28, Section 861a), as amended by the Act of April 26, 1928 (45 Stat. 466; U.S.C.A., Title 28, Section 861b), the present appeal is brought in lieu of a writ of error.

II.

RULE OF THE RAILROAD COMMISSION, THE VALIDITY OF WHICH IS INVOLVED

The suit involves the validity of Rule 15 of the orders promulgated by the Railroad Commission of Texas to control the production of oil from the Hawkins Field in Wood County, Texas. The purpose of the order or rule is to divide or prorate among the wells and leases in the field the total number of barrels of oil which under the orders of the Railroad Commission the well operators in said field are allowed daily to produce from the field. Under Texas law it has the force of a statute. *(Sun Oil Co. vs. Railroad Commission*, 68 S. W. (2d) 609, 611.) Said rule or order is as follows:

> "RULE 15. (a) The proration unit shall be twenty (20) acres, and no acreage shall be assigned to a unit which is more than one thousand fifty (1,050) feet from a producing well. A tolerance of ten (10) acres on the last well on producing tracts of more than twenty (20) acres shall be allowed where the size and shape of the tract so warrants. Where tolerance is allowed, no acreage shall be assigned to the unit or the last well which is more than twelve hundred eighty (1280) feet from the well. Units which do not contain as much as twenty (20) acres shall be considered as fractional units. Acreage units or fractions thereof whether containing more or less than twenty (20) acres will be considered, for

proration purposes, on the basis of the actual acreage assigned to the individual unit or fractional unit.

(b) Provided, however, that for the period of the War Emergency or for the period of P.A.W. restrictions on drilling, and for a period of not to exceed six (6) months following the termination of said emergency or the lifting of the P.A.W. restrictions on drilling, any well which, as a result of such restrictions, has been required to have available for assignment to it not less than forty (40) surface acres may receive credit in the allocation program for the entire forty (40) acres assigned to the well for drilling purposes so long as the two points farthermost removed from each other and contained in such drilling unit are not in excess of 2087 feet apart.

(c) The total daily field allowable as fixed by the Commission, after deductions have been made for marginal wells, wells incapable of making their allowable, and high gas-oil ratio wells, shall be distributed to the remaining wells in the field on the following basis: To each remaining well in the field X barrels of oil shall be allocated. In addition to X barrels each of these remaining wells shall receive an amount of allowable oil equal to five (5%) per cent of X barrels for each acre in the unit up to and including twenty (20) acres.

(d) Provided, however, that for the period of the War Emergency or for the period of P.A.W. restrictions on drilling, and for a period of not to exceed six (6) months

following the termination of said emergency or the lifting of the P.A.W. restrictions on drilling, any well which may be assigned forty (40) acres under the provisions of paragraph (b) hereof shall, in addition to the allowable accruing to such well by application of the provisions of paragraph (c) hereof, be assigned an allowable equal to ten (10) per cent of X barrels for each acre assigned such well above twenty (20) acres.

(e) It is the intent of this order to provide that a well to which twenty (20) acres has been assigned shall not receive an allowable greater than twice that which has been assigned to a well on a tract less than one(1) acre, that a well to which there has been assigned as much as thirty (30) acres shall not receive an allowable greater than two and one-half (2½) times the allowable of a well to which has been assigned less than one (1) acre, and that a well to which forty (40) acres has been assigned shall not receive an allowable greater than four times that which is assigned to a well on a tract less than one (1) acre."

III.

DATE OF THE JUDGMENT AND DATE OF PRESENTATION OF PETITION FOR APPEAL

1. The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, of which a review is sought by this appeal, was entered on March 6, 1946. Appellants' motion for rehearing in the Court of Civil Appeals was filed

within fifteen days after the entry of the judgment, as authorized by Rule 458, Texas Rules of Practice and Procedure in Civil Actions. The motion was entertained by the Court of Civil Appeals and overruled on April 10, 1946. Thereupon, within the time allowed and in the manner provided by Texas law (Rule 468, Texas Rules of Practice and Procedure in Civil Actions), appellants filed their application for writ of error addressed to the Supreme Court of Texas, petitioning that Court to grant writ of error to said Court of Civil Appeals to the end that the judgment of the Court of Civil Appeals might be reviewed and reversed. The application was entertained by the Supreme Court of Texas and refused on December 18, 1946. Appellants thereupon, within fifteen days, as authorized by Texas law (Rule 515, Texas Rules of Practice and Procedure in Civil Actions), filed their motion for rehearing on order of the Supreme Court refusing their application for writ of error. Said motion for rehearing was entertained by the Supreme Court of Texas and was overruled on January 15, 1947.

Whereupon the judgment of the Court of Civil Appeals, here sought to be reviewed, became final under Texas law on January 15, 1947.

The Court of Civil Appeals for the Third Supreme Judicial District of Texas, Austin, Texas, has possession of the record in this cause and is the highest Court of the State in which a decision in this suit could be had.

The following are examples of cases brought to this Court by writ of error or appeal from Courts

of Civil Appeals in Texas: *Zucht vs. King*, 260 U. S. 174; *Lone Star Gas Co. vs. Texas et al*, 304 U. S. 224; *H. E. Butt Grocery Co. et al vs. Sheppard, Comptroller of Public Accounts of Texas, et al*, 311 U. S. 608.

2. Petition for allowance of an appeal to this Court was presented to the Chief Justice of said Court of Civil Appeals on March 27, 1947, and it was refused by him, because of the consistent policy of said Chief Justice to refuse all petitions for appeal to this Court, as appears from his order thereon. (R., 2113-2120, 2121.)

3. The date on which this application for appeal is presented to this Court is April 11, 1947.

IV.

STATEMENT OF THE NATURE OF THE CASE AND OF RULINGS OF THE STATE COURT WHICH BRING THIS CAUSE WITHIN THE ABOVE STATED STATUTORY JURISDICTION OF THIS COURT

Nature of the Case

This litigation originated by a petition filed by Humble Oil & Refining Company in the District Court of Travis County, Texas, Ninety-eighth Judicial District, against the Railroad Commission of Texas, the members thereof and the Attorney General of Texas. The suit was brought under a Texas Statute (Article 6049(c), Section 8, Vernon's Texas Civil Statutes), authorizing any interested person "affected by * * * any rule, regulation or order

made or promulgated by the Commission * * * to file suit * * * against the Commission * * * to test the validity of said laws, rules, regulations or orders," and under the Constitution of the United States, claiming that Rule 15 is void thereunder (R., 2-14).

Appellants filed their plea in intervention under the authority of the above mentioned statute, challenging the validity of Rule 15 and asserting rights under the Constitution of the United States, alleging that the said order or rule is void under the Constitution of the United States because it has the effect to discriminate against appellants and to allow a taking of their property without due process of law (R., 15-23).

Appellants asked for judgment declaring Rule 15 void, and prayed for injunction restraining enforcement thereof to control production of oil from appellants' properties (R., 22-23).

Charles H. Ashcroft and others named in the petition for appeal, owners of rights in lands located in the hereinafter mentioned Hawkins townsite, intervened, asserting the validity of said rule or order of the Railroad Commission (R., 54-113).

The case was tried to a jury and upon a verdict favorable to Humble Oil & Refining Company and appellants, the trial Court entered judgment decreeing Rule 15 invalid and enjoining enforcement thereof to control production of oil from wells and lands in which appellants were interested as royalty owners and in which two of appellants also were interested as owners of fractional parts of the working interests under oil and gas leases (R., 241-245).

Nature of the Rulings of the State Court Which Bring This Case Within the Jurisdiction of this Court

The Railroad Commission of Texas, the members thereof, the Attorney General of Texas and interveners Ashcroft and others prosecuted an appeal to the Court of Civil Appeals. The Court of Civil Appeals, pursuant to a written opinion *(Railroad Commission of Texas et al. vs. Humble Oil & Refining Company et al*, 193 S. W. (2d) 824), which is copied in the appendix hereto, holding valid Rule 15, entered a judgment reversing the judgment of the trial Court and rendering judgment against these appellants.

The Court of Civil Appeals found that "there was no conflict regarding the issue of substantial uncompensated excess drainage"; that all witnesses "testified, and appellants (appellees here) admit in their brief, that there was such drainage, although not conceding the extent thereof as testified to by Humble's witnesses"; and held that if "this issue constituted the only factor involved in determining the validity of the order, then appellee's (appellants here) contention that its invalidity was conclusively shown would be correct, and require an affirmance of the judgment" (Appendix, *post*, 41; 193 S. W. (2d) 829).

The testimony was undisputed that the method of distributing the field allowable provided by Rule 15 was not necessary to prevent waste, that other formulas could be adopted which would reduce the extent of the resulting drainage without causing waste (R., 950-951, 1737-1739, 1795-1799).

The Court of Civil Appeals found that the evidence showed that the relative percentage could be changed from the 50-50 basis by increasing the acreage allowable to say 60% and reducing the per well allowable to 40% without causing waste. (Appendix, *post*, 48; 193 S. W. (2d) 831). Such a change in the proration formula would obviously reduce the allowable production of wells in the densely drilled townsite and increase the allowable to wells on the larger tracts in which appellants are interested as royalty owners.

The Court of Civil Appeals discussed the advantages of proration or conservation regulations and ultimately upheld the rule or order on the basis that "considering only the compensatory effect of reduced drilling costs, and this independently of reduced operating costs, we think the order was well within the discretionary powers of the Commission in making it" (Appendix, *post*, 55-56; 193 S. W. (2d) 834).

Appellants (as royalty owners who do not have any drilling or operating costs to pay) in their motion for rehearing in the Court of Civil Appeals assigned error in the judgment of that Court in that the undisputed evidence showed that Rule 15 operates to discriminate against each of the appellants in favor of well operators in the townsite and to deny to appellants, and to each of them, the equal protection of the law as guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and to take the property of appellants, and of each

of them, without due process of law as guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States (R., 1957). The motion was overruled.

In their petition for writ of error to the Supreme Court of Texas, appellants assigned error in the judgment of the Court of Civil Appeals in that it sanctioned as lawful a denial to appellants, and to each of them, of the equal protection of the law contrary to the guaranties of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and sanctioned as lawful a taking of the property of appellants, and of each of them, without due process of law, contrary to the guaranties of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States (R., 2015, 2056). The application was refused, and motion for rehearing was overruled.

The Court of Civil Appeals having entertained and overruled appellants' motion for rehearing wherein there was presented by assignments of error the contentions that the undisputed evidence showed that Rule 15 operates to discriminate against appellants contrary to the guaranties of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and to take the property of appellants without due process of law in violation of the Due Process Clause of the Fourteenth Amendment, the order overruling the motion necesarily upheld Rule 15 against the contention that it was invalid under the stated provisions of the Fourteenth Amendment.

The Supreme Court having entertained and refused appellants' application for writ of error, presenting as points of error that the judgment of the Court of Civil Appeals was erroneous in that it sanctioned as lawful a denial to appellants of the equal protection of the law contrary to the guaranties of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and sanctioned as lawful a taking of the property of appellants in violation of the guaranties of the Due Process Clause of the Fourteenth Amendment; and the Supreme Court having overruled appellants' motion for rehearing on its application for writ of error, the orders of the Supreme Court necessarily had the effect to deny appellants' contentions that Rule 15 is void under the facts of this case because of its conflict with the stated provisions of the Fourteenth Amendment.

Under Rule 483, Texas Rules of Practice and Procedure in Civil Actions ("In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the Court are correctly determined, the Supreme Court will refuse the application with the docket notation, 'Refused' "), the order of the Supreme Court refusing the application for writ of error and the order overruling the motion for rehearing thereon was necessarily a denial by the Supreme Court of the contentions made by appellants that Rule 15 is void under the above stated provisions of the Fourteenth Amendment.

V.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THAT THE QUESTIONS INVOLVED ARE SUBSTANTIAL AND CASES BELIEVED TO SUSTAIN JURISDICTION OF THIS COURT ON APPEAL

Rule 15 was promulgated by the Railroad Commission of Texas on August 3, 1944, in the exercise of delegated legislative authority. In was promulgated to operate prospectively; it is legislative in character, and under Texas law it has the force and effect of an enactment of the legislature. *(Sun Oil Co. vs. Railroad Commission*, 68 S. W. (2d) 609, 611; *Texarkana & Ft. S. Ry. Co. et al vs. Houston Gas & Fuel Co.*, 121 Tex. 594, 51 S. W. (2d) 284, 287; *Railroad Commission et al vs. Uvalde Const. Co. et al*, 49 S. W. (2d) 1113, 1114; *West Texas Compress & Warehouse Co. vs. Panhandle & S. F. Ry. Co. et al*, 15 S. W. (2d) 558, 560; *Missouri-Kansas-Texas Ry. Co. of Tex. et al vs. Railroad Commission of Texas et al*, 3 S. W. (2d) 489, 494.) Violations of the order or rule may be punished by infliction of penalties; the purchase, sale, transportation or handling of any oil produced in violation of the rule or order are prohibited and may be enjoined at the suit of the State; and any oil produced in violation of such rule or order is declared by statute to be a nuisance and may be forfeited to the State at the suit of the Attorney General. (Articles 6036, 6049e and 6066a, Vernon's Texas Civil Statutes.) Therefore the Railroad Commission order or rule challenged in this case has, under Texas law, the

force and effect of a statute and is within the meaning of the term "a statute of any State," as used in Section 237(a) of the Judicial Code, as amended. *(Lake Erie & Western RR. Co. vs. State Public Utilities Com. of Ill.*, 249 U. S. 422, 424; *Northwestern Bell Telephone Co. vs. Nebraska State Ry. Co.*, 297 U. S. 471; *Lone Star Gas Co. vs. Texas et al*, 304 U. S. 224; *Jurisdiction of the Supreme Court of the United States, Robertson and Kirkham*, pp. 11-14.)

Pertinent Facts of the Case

The Hawkins Field is traversed by a large fault (R., 1881) which divides the field into what is referred to in the record as "East Hawkins" and "West Hawkins." The displacement of the fault is such as to prevent any substantial migration of oil between "East Hawkins" and "West Hawkins," and the reservoir in one is regarded as separate from the reservoir in the other (R., 529, 533-536, 559). Within "West Hawkins" is an area known as the Hawkins townsite which is divided into small lots and blocks covering an area of approximately 137 acres. Ninety-one (91) wells have been drilled within the townsite, of which eighty-seven (87) wells have been drilled on 73.7 acres of the townsite. There is nothing to prevent drainage of oil from other portions of "West Hawkins" into the Hawkins townsite area. (R., 559.) Such drainage does take place as a result of the enforcement of Rule 15 (R., 907-908, 1403-1404, 1737, 1799). Appellants own royalty interests in lands located in the "West Hawkins" area outside of the densely drilled townsite, and two of

appellants own fractional interests in the working interest under oil and gas leases affecting lands in the "West Hawkins" area outside of the townsite but adjacent thereto.

The proration formula of the challenged order is what is commonly referred to as a "50-50 order." In its operation, the practical effect of the order (Rule 15) is to allow a well drilled on a 20-acre tract to produce daily not exceeding twice as much oil as a well drilled on the smallest tract in the field, and to allow a well drilled on a 40-acre tract to produce daily not exceeding four times as much oil as a well drilled on the smallest tract in the field. (R., 611-614.) This method of allocating the field allowable, in view of the number of small tracts in the townsite and the density of drilling there, results in the townsite being allowed to produce more oil in proportion to its reserves than other parts of the field, and in the drainage of large quantities of oil to the townsite. (R., 907-908, 1403-1404, 1737, 1799.)

Pertinent facts with respect to the townsite and the development and production there are: 87 producing wells have been drilled on 73.74 acres (R., 560)—an average density of one well to each .84 acre; the 73.74 acres represent 1.05% of the productive area of "West Hawkins" (R., 925); the 73.74 acres have 1.86% of the recoverable oil in place in "West Hawkins" (R., 620, 1848); the 73.74 acres is allowed to produce daily 4147 barrels of the daily allowable of 38,269 barrels to "West Hawkins" or 10.8% of the total daily allowable to "West Hawkins" (R., 561, 925).

The total productive area of "West Hawkins" is 7060 acres (R., 567-568, 1848) of which 6986.26 acres are outside of the densely drilled 73.74 acres of the townsite; this area, having 98.14% of the recoverable oil in place is allowed to produce 34,122 barrels of the daily allowable, or only 89.2% of the daily allowable (R., 925), as against its 98.14% of the reserves.

The effect of Rule 15 in operation is illustrated by the following tabulations and the comparisons which follow the tabulations (R., 890-901, 1163-1165, 1846-1847):

Lease	Surface Acreage	Number of Wells	Daily Allowable in Barrels	Barrels Daily per 100-acre Feet of Sand	Barrels Daily per Surface Acre
1. Densely Drilled Townsite					
	73.74	87	4147	29.7	56.7
2. Townsite Acreage Owned by Interveners Ashcroft et al					
	30.77	48	2276	38	74
3. Townsite Leases					
Rudco-Allen	.08	1	46	255.55	575
Rudco Cobb Heirs	.04	1	46	522.72	1150
Roger Lacy-Price	.11	1	46	206	418
Gen. Am. M.E. Church	.04	1	46	657.14	1150
Gen. Am. Sch. Dist.	.06	1	46	407.8	776
TOTAL	.33	5	230		
4. Leases Adjoining Townsite					
E. M. Slaughter	46.63	3	234	5.19	5.6
J. M. Henry	29.92	1	115	2.38	3.8
TOTAL	71.55	4	349		
5. Leases in Which Appellants Own Royalty Located Outside of Townsite					
Ella M. Faulk	148	5	644	2.33	4.3
N. M. Shamburger	141.5	5	644	2.5	4.5
S. H. Moore	140.9	4	644	2.95	4.6
Floy K. Williams	878.51	26	3907	3.11	4.5
L. A. Bryan	408	17	2287	5.26	5.6
TOTAL	1716.91	57	8126		

The densely drilled townsite, considered as a whole (Table 1), is allowed to produce on each producing day at the rate of 56.7 barrels per surface acre, while the Slaughter and Henry leases (Table 4), adjoining the townsite and including 71.55 acres as against the 73.74 acres in the densely drilled townsite, are allowed to produce each producing day at the rate of only 4.74 barrels per surface acre.

The leases shown in Table 3, having a total area of .33 of an acre, are allowed to produce each producing day at the rate of 696 barrels of oil per surface acre, while the Slaughter lease of 46.63 acres (Table 4), adjoining the townsite, is allowed to produce each producing day at the rate of only 5.6 barrels per surface acre; and the Henry lease of 29.92 acres (Table 4), also adjoining the townsite, is allowed to produce each producing day at the rate of only 3.8 barrels of oil per surface acre. The area of the Slaughter lease is 140 times the area of the tracts shown in Table 3, but the tracts shown in Table 3, comprising .33 of an acre, are allowed to produce each producing day 124 times as much oil per surface acre as is allowed to the Slaughter tract. The tracts shown in Table 3, comprising .33 of an acre, are allowed to produce each producing day 183 times as much oil per surface acre as the Henry tract (Table 4). The daily allowable of the Slaughter lease of 46.63 acres is only 234 barrels, while the daily allowable of the leases shown in Table 3 comprising .33 of an acre is 230 barrels,—a difference of 4 barrels in favor of the tract that is 140 times as large as the .33 of an acre tracts. The densely drilled townsite

(Table 1) has a daily allowable which is 11.88 times as much as the daily allowable of the Slaughter lease and the Henry lease (Table 4) comprising 71.55 acres adjoining the townsite. A comparison between Table 1 and Table 4 shows the glaring inequality between adjoining lands resulting from the proration formula involved in this suit.

The daily allowable of the leases shown in Table 5, comprising 1,716.91 acres, is a little less than double that of the 73.74 acres in the densely drilled townsite (Table 1). The densely drilled townsite of 73.74 acres has a total daily allowable of 4,147 barrels of oil, or 240 barrels of oil more per day than the Floy K. Williams tract (Table 5) of 878.51 acres.

The testimony from which the above tabulations were made appears on pages 369 to 380 of the Statement of Facts (R., 890-901). Appellants own royalty interests in the Slaughter, Henry, Faulk, Shamburger, Moore, Williams and Bryan tracts listed in the above tabulations. (R., 1163-1165, 1846-1847.)

Further, the arbitrary character of the order is readily revealed by comparing the daily production of tracts in the townsite per 100 acre feet of sand with the daily production of leases outside the townsite per 100 acre feet of sand. Humble Oil & Refining Company owns leases covering 6,279.85 productive surface acres of the total 6,986.26 productive acres in "West Hawkins" lying outside of the townsite. The daily allowable for Humble's 6,279.85 productive acres lying outside of the townsite is 4.5 barrels per 100 acre feet of sand (R., 1848). The 73.74 acre densely drilled townsite area is allowed

to produce daily at the rate of 29.7 barrels per 100 acre feet of sand (R., 894) or 6.6 times as much in proportion as Humble's leases outside the townsite.

The testimony (R., 904-910, 950-955) is undisputed that there are no physical facts requiring or justifying such a difference in rate of production between the townsite and the area of "West Hawkins" outside the townsite as results from the proration formula provided in the challenged order; that no consideration of the prevention of waste makes necessary such favoritism to the townsite; that production of oil from the townsite in the quantities allowed by the order results in drainage of oil from leases outside the townsite to the townsite; that such drainage has been and is now occurring; and that proration orders could be written which would place the tracts on a more equal basis in the production of oil without resulting in waste.

Boatright, a witness introduced by appellees, testified (R., 1385-1390, 1393-1394, 1403-1408, 1461-1466) that the proration formula prescribed by Rule 15 of the order does not distribute the daily field allowable among the leases in proportion to what they have of recoverable reserves; that under this formula operators in the field are not allowed to produce proportionately according to their reserves; that drainage to the townsite from areas outside the townsite, up to February 1, 1945, had amounted to 2,000,000 barrels of oil.

Teis, a witness introduced by appellees, testified (R., 1737-1739) that the proration formula is not related to reserves; that it results in drainage to the

townsite from leases outside the townsite; that it results in leases outside the townsite losing oil to the townsite; that the advantage given to the townsite by the proration formula is not necessary to prevent waste; that the allowable to townsite wells could be reduced substantially and the allowable to wells on the larger tracts outside of the townsite increased substantially without causing waste.

Baumel, Director of Production and Chief Engineer of the Oil and Gas Division of the Railroad Commission, testified (R., 1795-1799) that, based on the testimony he had heard on the trial of this case, under the existing proration order, the townsite is allowed to produce ten times as much oil per day in proportion to its reserves as the balance of the field; that the existing order does not distribute the allowable ratably among the leases in proportion to their respective reserves; that under the existing order the townsite is draining oil from other areas in the field and will continue to do so as long as the formula is in effect; that the existing method of distributing the field allowable is not necessary to prevent waste; that the amount of allowable to townsite wells could be reduced substantially and that of wells on the larger tracts outside of the townsite increased without causing waste; and that what had been stated as to the effect of the rule on tracts outside of the townsite is true in respect to the leases in which appellants are interested.

The losses which will be sustained by leases in which appellants own interests, if Rule 15 is continued for the life of the field, are illustrated by the

following tabulation prepared from the testimony of Boatright, a witness introduced by appellees (R., 1373-1381):

Name of Lease	Loss of Oil
Ella M. Faulk	5,942,000 barrels
N. M. Shamburger	5,183,000 barrels
S. H. Moore	2,329,000 barrels
Floy K. Williams	11,358,000 barrels

The calculations (R., 1381-1385) were based upon the estimated number of acre feet of sand in the respective leases as determined by Morgan Davis, a geologist introduced as a witness by Humble Oil & Refining Company, and accepted by Boatright; upon Boatright's estimate of a 27½ year life of the field, and upon his estimate of the recoverable oil in the respective leases, which varied in amount, depending upon the density of drilling. Boatright testified that such estimates were subject to errors, but he also testified that even if the field lasted for 40 years and the existing order was continued in force that these leases would lose oil from drainage. He also stated that if the estimated amount of recoverable oil was reduced 10% and the order was continued in force during the life of the field, these leases would still suffer a loss from drainage.

The testimony is undisputed that none of the leases in which appellants own interests (R., 908, 1163-1167) is allowed currently to produce, along with other areas in the field, in proportion to their reserves (R., 910); and that each of the leases in which appellants own interests is suffering drainage

by reason of the large daily allowable to the densely drilled townsite (R., 952-953). The only testimony that might call this last statement in question is Davis' statement (R., 911) that, "I don't think most of them would recover as much oil as was recoverable oil as was in place originally or is in place now"; or Baumel's statement (R., 1801) that while he had previously testified that the Slaughter and Henry were being drained, "I have my doubts about those two leases." However, when these statements are analyzed it will be seen that they do not contradict other positive testimony that each of the tracts in which appellants own interests is being drained. There was not any testimony from any source or anybody that there was any compensating drainage to any tract in which appellants own interests.

Holdings of the Court of Civil Appeals Which Involve Questions of a Substantial Nature and of Which This Court Has Jurisdiction on Appeal

The opinion of the Court of Civil Appeals recognizes that Rule 15 results in a taking of the oil from the owners of the large tracts in favor of the owners of small tracts and attempts to justify this taking in so far as the lease owner or well operator is concerned on the basis that such lease owner or well operator is compensated through the savings in drilling and operating costs resulting from proration. But, without attempting to justify the taking of these royalty owners' oil, the Court nevertheless in holding valid Rule 15, has upheld as lawful such taking of the property of these royalty owners.

The formula included in Rule 15 "is popularly termed a 50-50 basis; that is, in substance, allocating one-half the daily allowable on a per well basis and the other half upon a surface acreage basis" (193 S. W. (2d) 826; Appendix, 33). It is obvious that under such a formula wells on small tracts are allowed to produce substantially more oil in proportion to surface acreage than wells on large tracts, and that the basis of the rule is not related to the oil and gas reserves of the several properties in the field, except as reserves of different tracts may be in direct proportion to surface area. The undisputed testimony that Rule 15 results in drainage from the larger tracts to the small tracts, and the finding that it results in "substantial uncompensated excess drainage" demonstrate that the acreage factor does not relate well allowables to the oil reserves of the respective owners, or protect their correlative rights.

Under the formula involved in this case "a well on less than one acre was given one-half the allowable of a well on 20 acres; or, stated differently, a well on a 20 acre tract could not have in excess of double the allowable of a well upon a tract of less than one acre." (193 S. W. (2d) 826; Appendix, 33.) It is obvious that if the acreage factor in the formula were given greater weight and the per well factor less weight that wells drilled on large tracts would have a greater percentage of the field allowable and wells on small tracts would have a lesser percentage of the field allowable than under the existing order, with a resulting reduction in the amount of the drainage.

The Court mentioned the fact that it was suggested in the case that the percentage be changed from the 50-50 basis by increasing the acreage allowable to 60% and reducing the per well allowable to 40%, and found that the evidence showed that such a change could be made without causing waste. (193 S. W. (2d) 831; Appendix, 48.)

The Court of Civil Appeals found upon the basis of the testimony that there was sharp conflict therein upon "several factual issues," but that "there was no conflict regarding the issue of substantial uncompensated excess drainage" and said: "All the witnesses testified, and appellants (appellees here) admit in their brief, that there was such drainage, although not conceding the extent thereof as testified to by Humble's witnesses." (193 S. W. (2d) 829; Appendix, 41.)

Having thus determined that the undisputed evidence shows that the existing order results in substantial, uncompensated excess drainage from the larger tracts to the small tracts in the townsite, and having further found that the evidence showed that to an extent, at least, the cause of this drainage could be corrected without resulting in waste, the Court of Civil Appeals nevertheless set about to find a basis for upholding the order, notwithstanding its failure to protect the correlative rights of adjacent lease owners within the limits of what was necessary to prevent waste of oil and gas. In this endeavor the Court of Civil Appeals stated its assumption that small tracts have natural advantages over large tracts in unrestricted production, and the further

assumption that under proration large tract owners would share more in the benefits of proration than the owners of small tracts, but the Court said (193 S. W. (2d) 832; Appendix, 51) that:

> * * * "The evidence does not afford the means of evaluating these factors and probably means for such evaluation could not be obtained. That they do afford a substantial advantage to the large tract owners we have no doubt."

There being nothing in the record to form the basis of evaluating the advantages of proration to large tract owners as compared with the advantages to small tract owners, and recognizing that probably no means of making such evaluation could be found, the Court then looked for another basis upon which to uphold Rule 15. Pointing out the savings in drilling costs and production costs to operators of wells drilled on large tracts, resulting from restrictions in the number of wells that may be drilled and the amount of oil that may be produced, as compared with uncontrolled drilling and production, the Court of Civil Appeals concluded that the amount of money so saved to Humble Oil & Refining Company (a lease owner and well operator) would compensate it for the oil which the small tract owners were allowed to drain from Humble's lands under the challenged rule. In other words, the Court in effect held that the drainage of Humble's lands resulting from Rule 15 could be justified on the basis that proration had the effect to save Humble drilling and production

costs. (193 S. W. (2d) 832-833; Appendix, 51-52.) Here the Court did not consider or mention the rights of royalty owners as distinguished from lease owners, and in effect held that a proration formula which takes a part of the royalty owners' oil is valid if the saving in drilling and production costs to the lease owner, resulting from proration, equals the value of the oil taken from the lease owner by reason of the formula. The Court then said (193 S. W. (2d) 834; Appendix, 55-56):

> "Waiving other issues aside, however, and considering only the compensatory effect of reduced drilling costs, and this independently of reduced operating costs, we think the order was well within the discretionery powers of the Commission in making it."

The basis of all proration and well spacing orders of the Railroad Commission must be the conservation of oil and gas, and they can be sustained only where necessary to prevent waste. Oil in place belongs to the owner of the soil, subject to the right of capture by owners of adjacent property. The ownership of oil in place and the right of capture are property rights under Texas law. (*Texas Co. vs. Daugherty*, 107 Tex. 226, 176 S. W. 717; *Brown vs. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069; *Corzelius vs. Harrell*, 143 Tex. 509, 186 S. W. (2d) 961.)

As said by the Court of Civil Appeals in this case, restriction upon the amount of oil which may

be produced from a well "is essentially an infringement upon the right of private property, and can only be upheld as a conservation measure" (193 S. W. (2d) 832; Appendix, 50).

In the absence of proration by the Railroad Commission, a property owner may exercise both offensively and defensively the right of capture; offensively, by drilling wells and producing oil to drain the lands of adjacent owners; defensively, by drilling offset wells and producing oil to prevent adjacent owners from draining his lands. Under proration exercise of this right of capture is limited by Railroad Commission orders controlling the spacing of wells and the amount of oil that may be produced from them. Under proration, property owners being prevented from so fending for themselves, the law requires that in promulgating and enforcing proration and well spacing orders, the Commission must take into consideration and protect the correlative rights of the persons and properties affected by such orders. *(Corzelius vs. Harrell,* 143 Tex. 509, 186 S. W. (2d) 961, 968; *Marrs vs. Railroad Commission,* 142 Tex. 293, 177 S. W. (2d) 941; *Gulf Land Co. vs. Atlantic Refining Co.,* 134 Tex. 59, 131 S. W. (2d) 73.)

Marrs et al vs. Railroad Commission et al, 142 Tex. 293, 177 S. W. (2d) 941, involved a proration formula which allocated a part of the field allowable to marginal wells and the remainder to non-marginal wells "on the basis of 50% per well and 50% average potential productivity as applied to unitized acreage and other factors." The result of the order was that

there was underground drainage out of and away from the plaintiffs' properties to the properties of other producers from the same reservoir. In that case the Court said (177 S. W. (2d) 948):

> "Under the findings of the trial court the allowables as fixed by the Railroad Commission for the two areas are entirely out of proportion to the potentials thereof. They are not in proportion to the oil under the different areas. It is very evident that petitioners are not being permitted to mine their just proportion of the oil. * * * If petitioners were free to fend for themselves they could mine the oil under their land and thus prevent its escape to the adjoining area. But the orders of the Railroad Commission here complained of prevent petitioners from so doing. As a result, petitioners are being forever deprived of their property. It is the taking of one man's property and the giving it to another."

These appellants are royalty owners. Their royalty is a free royalty right. They do not have to pay any part of the cost of drilling wells on the lands in which they own royalty rights. Neither do they have to pay any part of the cost of operating the wells. Any saving that may result from Rule 15 in the cost of drilling and operating wells is a saving to the lease owner or well operator and not to these appellants who are royalty owners.

It is undisputed in the record and recognized by the Court that Rule 15 results in excess and uncom-

pensated drainage from the lands in which appellants own royalty interests. It is further undisputed in the evidence and recognized by the Court that other formulas of proration could be adopted which would reduce the extent of the drainage without causing waste. The order, therefore, is not necessary as a waste prevention measure. The Court has upheld the order on the basis that the lease owner is compensated through savings in drilling and operating costs resulting from proration for the oil drained from such lease owners' lands; but the Court, without attempting to justify the effect of the rule on royalty owners or find any compensation to them for the oil drained from their lands, at the same time has upheld as valid the admitted taking of these royalty owners' oil.

The opinion of the Court of Civil Appeals shows on its face that the Court did not attempt to meet or answer the fact showing that the effect of Rule 15 is to unnecessarily take the property of these appellants for the benefit of others.

It therefore appears from the face of the opinion of the Court of Civil Appeals that Rule 15 results in a taking of the property of these appellants and that the taking is contrary to the provisions of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The questions presented by this appeal, involving the constitutional rights of appellants, are substantial.

VI.

OPINION APPENDED

Copy of the opinion of the Court of Civil Appeals *(Railroad Commission of Texas et al vs. Humble Oil & Refining Company et al,* 193 S. W. (2d) 824) is printed as an appendix hereto.

WHEREFORE, appellants pray that the appeal be allowed and that the judgment of the Court of Civil Appeals be reversed and the judgment of the trial Court affirmed; or, in the alternative, that the judgment of the Court of Civil Appeals be reversed and the cause remanded to that Court.

Respectfully submitted,

DAN MOODY,
Austin, Texas,

Attorney for Appellants, Floy K. Williams, D. F. Williams, L. A. Bryan, Jr., Jack Kay, Paul D. Smith, R. L. Peveto, Florence Cowles Hamlett and A. L. Atkins.

APPENDIX

No. 9528

RAILROAD COMMISSION OF TEXAS ET AL, Appellants

vs.

HUMBLE OIL & REFINING COMPANY ET AL, Appellees

APPEAL FROM 53RD JUDICIAL DISTRICT COURT, TRAVIS COUNTY

This is an oil proration suit challenging the validity of an order of the Commission (Railroad Commission of Texas), dated August 3, 1944 (copied in full in note below*) amending its previous order prorating the field allowable of the Hawkins field

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* Rule 15. (a) The proration unit shall be twenty (20) acres, and no acreage shall be assigned to a unit which is more than one thousand fifty (1,050) feet from a producing well. A tolerance of ten (10) acres on the last well on producing tracts of more than twenty acres shall be allowed where the size and shape of the tract so warrants. Where tolerance is allowed, no acreage shall be assigned to the unit or the last well which is more than twelve hundred eighty (1280) feet from the well. Units which do not contain as much as twenty acres shall be considered as fractional units. Acreage units or fractions thereof whether containing more or less than twenty acres will be considered, for proration purposes, on the basis of the actual acreage assigned to the individual unit or fractional unit.

(b) Provided, however, that for the period of the War Emergency or for the period of P.A.W. restrictions on drilling, and for a period of not to exceed six months following the termination of said emergency or the lifting of the P.A.W. restrictions on drilling, any well which, as a result of such restrictions, has been required to have available

in Wood County among the wells in that field (other than marginal and high gas-oil ratio wells, not here involved), upon what is popularly termed a 50-50 basis; that is, in substance, allocating one-half the daily allowable on a per well basis and the other half upon a surface acreage basis. The spacing rule in the field (concededly proper by all parties) was twenty acres. Under this formula a well on less than one acre was given one-half the allowable of a well on 20 acres; or, stated differently, a well on a 20-acre tract could not have in excess of double the allowable of a well upon a tract of less than one acre; the acreage allowable being allocated upon the basis of 5% per acre up to and including 20 acres. The amendment of August 3, 1944, which was predicated upon the Federal P.A.W. (Petro-

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for assignment to it not less than forty surface acres may receive credit in the allocation program for the entire forty acres assigned to the well for drilling purposes so long as the two points farthermost removed from each other and contained in such drilling unit are not in excess of 2087 feet apart.

(c) The total daily field allowance as fixed by the Commission, after deductions have been made for marginal wells, wells incapable of making their allowable, and high gas-oil ratio wells, shall be distributed to the remaining wells in the field on the following basis: To each remaining well in the field X barrels of oil shall be allocated. In addition to X barrels each of these remaining wells shall receive an amount of allowable oil equal to five (5%) per cent of X barrels for each acre in the unit up to and including twenty acres.

(d) Provided, however, that for the period of the War Emergency or for the period of P.A.W. restrictions on drilling, and for a period of not to exceed six months following the termination of said emergency or the lifting of the P.A.W. restrictions on drilling, any well which may be as-

leum Administration for War) order (M68) denying priorities for drilling material on tracts less than 40 acres, increased the acreage allowable of one well on a tract of more than 20 acres by 10% for each additional acre up to and including 40 acres. The effect of this amendment, which by its terms will expire six months after the termination of the present emergency or "the lifting of P.A.W. restrictions on drilling," was to give one well on a 40-acre tract twice the allowable of a well on a 20-acre tract or four times the allowable of a well on a tract of less than one acre. This formula, except for the 40-acre amendment of August 3, 1944, had been in effect since February, 1941, shortly after the field was discovered, except for a slight amendment, not here important, made in April 1941. P.A.W. Rule M68 was promulgated in December 1941.

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signed forty acres under the provisions of paragraph (b) hereof shall, in addition to the allowable accruing to such well by application of the provisions of paragraph (c) hereof, be assigned an allowable equal to ten per cent of X barrels for each acre assigned such well above twenty acres.

(e) It is the intent of this order to provide that a well to which twenty acres has been assigned shall not receive an allowable greater than twice that which has been assigned to a well on a tract less than one acre, that a well to which there has been assigned as much as thirty acres shall not receive an allowable greater than two and one-half times the allowable of a well to which has been assigned less than one acre, and that a well to which forty acres has been assigned shall not receive an allowable greater than four times that which is assigned to a well on a tract less than one acre.

It is further ordered that this cause be held open on the Docket for such other and further orders as may be necessary and supported by evidence of record. Railroad Commission of Texas.

The suit was brought by the Humble (Humble Oil & Refining Company, the largest producer in the field) against the Commission and its members. Several royalty owners intervened as parties plaintiff adopting the pleadings of the Humble; and a number of operators owning leases on small tracts in a densely drilled portion of Hawkins townsite, intervened as parties defendant.

The Humble's petition states that the effect of the amendment, under the present field allowable, is demonstrated by the following table:

	.1 Acre	.5 Acre	1.0 Acre	20 Acres	40 Acres
Schedule daily allowable under former order	65	66	67	130	130
Schedule daily allowable under amendment	46	47	48	92	184

And further:

"The Hawkins Field in Wood County, Texas, consists of approximately 9500 productive acres and on February 1, 1945, the field contained 405 producing oil wells. The Hawkins townsite, which is divided into small lots and blocks, occupies approximately 137 acres of said field and contains 91 of said wells. Eighty-seven of these townsite wells were drilled on a total of 73.7 acres. The field outside the townsite, consisting of approximately 9363 acres, contained 314 producing oil wells on February 1, 1945. All of the wells in the Hawkins Field, including the townsite wells, produce from one common reservoir."

The suit is predicated upon the assertion that the

order is confiscatory as between large and small tracts, against the former, which are chiefly owned by Humble, and in favor of the latter, in that it denies to Humble "a fair chance to produce its share of the oil in said common reservoir, with the result that plaintiff's properties are suffering net, uncompensated drainage to the wells of said townsite operators at the rate of approximately 2,500 barrels of oil per day."

The judgment cancelled the order appealed from and granted ancillary injunctive relief upon jury findings upon two special issues, that if allowed to remain in effect during the life of the Hawkins field the order will:

1. Prevent Humble "from producing the recoverable oil now in place under its land, or the equivalent in kind of such oil"; and

2. Prevent the operator of wells on any tract in which any one of certain designated parties (plaintiff-interveners) "owns royalties or working interests from producing the recoverable oil now in place under such tract, or its equivalent in kind of such oil."

The Commission and defendant-interveners have appealed.

In the main the grounds of error relied upon by appellants may be substantially stated in the following four contentions; in the first of which the Commission does not join:

1. Since no issue of waste, but only that of correlative rights is involved, the Humble and others interested in the field are estopped from questioning

the order, because they agreed among themselves upon the formula prescribed by the order and urged and acquiesced in its adoption by the Commission. This defense was stricken out on exception to defendant-interveners' pleadings.

2. It was error to exclude evidence of such agreement and position taken before the Commission, since it had material bearing upon the reasonableness of the order and the exercise by the Commission of its discretionary power in making it.

3. The order was not unreasonable or confiscatory, but was well within the discretionary powers of the Commission, and should have been upheld as a matter of law.

4. The proper test whether the order was confiscatory was whether it afforded Humble and others a *fair opportunity to produce*, and not (as presented in the special issues) whether it would *prevent them from producing* the recoverable oil or its equivalent underlying their lands. This contention is raised in objections to the special issues and refusal of requested special issues and explanatory charges.

We are sustaining the third of these contentions; and since the other three under this holding are without controlling effect we will state our views thereon only generally.

As to the first: We held in Commission v. Mackhank, 186 S. W. (2d) 351, that where no issue of conservation is involved, owners of adjoining leases may execute contracts, binding between themselves, with reference to their correlative rights. The case was taken to the Supreme Court upon another issue, as to which the decision of that court

was expressly limited. 190 S. W. (2d) 802. We refer to our opinion in that case for our views upon this question. In our opinion neither the facts alleged nor those offered in evidence in the instant case embrace the essential elements of contract or estoppel, which were clearly present in the Mackhank case. Generally speaking, and without going into extended detail, the allegations and proffered evidence were to the effect that shortly after the field was discovered and prior to the first proration or spacing order, there was a meeting at the Hawkins schoolhouse of all or practically all parties interested in the field, at which the question of the proper spacing and proration order was thoroughly discussed, and an agreement was reached substantially in accordance with the Commission order; and that this formula was presented to the Commission and acquiesced in by the Humble; its attorney. making certain statements commendatory of its fairness both in the first Commission hearing, and later when the first amendment of the order was made. At a hearing before the Commission in February 1942, a petition signed by all but two of plaintiff-interveners alleged:

"Heretofore you have issued field rules for the Hawkins Field in Wood County, Texas. These rules allocate the allowable production among the wells in the field by employing a formula which it was contemplated would ultimately allow a well on twenty acres to produce about two times as much oil as a well on one acre or less in the Hawkins townsite. The order was entered by the Commission after a full hearing and after the operators and royalty own-

ers involved had agreed in principle to such an allocation formula."

This petition was presented by Humble's attorney, who stated to the Commission at the time:

"The present basis of allocation in the field was worked out as a compromise measure between those who hold acreage in the townsite and those who hold acreage outside the townsite; and it was unanimously, as I remember, recommended to the Commission by operators in the townsite and outside the townsite. It was felt at the time that, in view of the fact that it would be necessary to drill more wells inside the townsite than outside the townsite, some concession should be made to that fact, and, as a basis, an allocation was agreed upon and was sanctioned by the Commission which give a certain percentage of the allowable of the field to the townsite area and the remaining percentage to the area outside of the townsite."

It was alleged that no substantial change in the situation affecting the propriety of the original order had subsequently taken place, other than P. A. W. Rule No. M68, which was taken care of in the 1944 amendment; and that investments had been made and vested rights had accrued in reliance upon the binding effect of this agreement and position taken before the Commission.

If for no other reason than the fact that there was no consideration for the alleged agreement, it was clearly not binding as between the parties to it, and therefore was wanting in an essential element of estoppel. And since it was not binding upon the parties, and created in them no vested right to the

continuance of the formula, it furnished no valid basis for reliance upon such continuance in favor of anyone thereafter dealing with the oil properties. The Commission's power to regulate oil production in the interest both of conservation and of protecting correlative rights is a continuing one, and its proration orders are subject to change, modification or amendment at any time, upon due notice and hearing, either upon the Commission's own motion or upon application of an interested party. This principle is now so well established as to require no citation of authority. It should also be noted that each of the proration orders governing the Hawkins field contained the following provision:

"It is further ordered that this cause be held open on the docket for such other and further orders as may be necessary and supported by evidence of record."

Thus each order carried on its face notice to everyone thereafter dealing with properties in the field, that it was subject to appropriate change.

If, as contended by appellees, the evidence conclusively shows the invalidity of the order, then the alleged agreement and position taken before the Commission became immaterial and evidence thereof was properly excluded.

On the other hand, if the evidence was of such character as to support a finding either upholding or cancelling the order, it would seem clear that what the parties themseives thought of the propriety of the order or were willing to accept as being substantially just and fair to them, would have a material evidentiary bearing on the controversy. This would be

especially true of the Humble whose interests in the field were a great deal larger than those of all the other operators combined; and who appears to be in better position to evaluate the various factors involved than anyone else. And this we think is true whether the validity of the order be tested by the substantial evidence rule or the independent judicial factual review rule. The factors involved are considered later under the third contention.

We also hold that the fourth contention should be sustained. As we construe the first special issue (and the same applies to the second), it called for a determination whether the Humble could under the order produce the recoverable oil in place underlying its lands, or its equivalent. In effect this was submitting the issue whether there existed, under the order, uncompensated excess drainage away from the lands of the Humble to other portions of the field. While there was sharp conflict in the testimony upon several factual issues, there was no conflict regarding the issue of substantial uncompensated excess drainage. All the witnesses testified, and appellants admit in their brief, that there was such drainage, although not conceding the extent thereof as testified to by Humble's witnesses. If therefore this issue constituted the only factor involved in determining the validity of the order, then appellee's contention that its invalidity was conclusively shown would be correct, and require an affirmance of the judgment. The proper test of the order's validity, as we construe the adjudicated cases on the subject, is whether it denies to Humble (and others) a fair opportunity to produce its recoverable oil. In deter-

mining whether the order affords such fair opportunity there are several pertinent factors other than embodied in the special issues. These are considered below, under our holding sustaining the third contention; but for which holding a remand of the cause for a new trial would be required under our holdings sustaining the second and fourth contentions.

The third contention requires a more extended consideration of the evidence than that contained in its meagre presentation above. The statement of facts is in two large volumes, 1326 of its 1375 typewritten foolscap pages constituting a question and answer transcription of the testimony of the witnesses, of whom there were six, three for appellees (Mr. Morgan J. Davis, Humble's chief geologist, Dr. Alexander Deussen, a consulting petroleum geologist, and Mr. Stuart E. Buckley, head of Humble's production research department) and three for appellants (Dr. Byron B. Boatright and Mr. Kenneth R. Teis, consulting petroleum geologists, and Mr. Jack Baumel, the Commission's Director of Production and Chief Engineer of the Oil and Gas Division). Additionally, there are many exhibits consisting of maps, charts, compilations, etc. The case was manifestly fully developed from the viewpoint of a factual presentation of everything actually known or which apparently could have been known regarding the field up to the time of trial, having any bearing upon the issues involved in the several contentions of the parties. While we shall endeavor to give an overall picture of the situation with sufficient specification to a clear understanding of what

we hold the controlling issues in the case, and shall point out the major conflicts in the testimony, it will not be necessary, in our view of the case, to set forth the evidence or even its substance in any extended detail.

The Hawkins structure is a large dome about 4.8 miles long (NE-SW) and 4 miles wide (E-W). It is highly faulted. One large fault on the E. side of the field has a maximum displacement of about 400 feet and divides the field into two areas known as East and West Hawkins. There appears to be no substantial migration between the two areas. The other faults are of varying displacement, some of them 100 feet and more. The production is from the Woodbine sands about 4,000 feet below sea level, or about 4,400 beet below the surface. The woodbine is divided between two horizons, the upper known as Lewisville and the lower as Dexter. Both horizons contain oil, but the Lewisville is largely impervious shale interspersed with oil producing sand lenses. The Dexter is interspersed with impervious shale lenses. The average producing sand thickness in the Dexter is about 107 feet. At about 4,400 feet sub-sea level is a tarry or asphaltic substance from three to ten feet thick, which separates the underlying water from the oil producing sands. The boundary between the Lewisville and Dexter follows the general domal outline of the structure and intersects the water level near the edges of the field, beyond which intersection and extending around the outskirts of the field production is only from the Lewisville. So far there is no water drive in the West Hawkins areas, due to this tarry layer. There

is a water drive in the East Hawkins area, and such is the case in all other Woodbine fields throughout East Texas. At the top of the dome and overlying the oil producing sands is a gas cap. In the West Hawkins the only natural lifting power of the oil in production is from gas pressure in the expansion of this gas cap and the release of gas in solution, there being no water drive in this area. Near the center of the field is a large free gas area from which there is no oil production. Several wells drilled in the producing area were dry holes. The townsite contains 137 acres, 63.26 is owned by T. & P. Ry. Co., and is under lease to Humble. It has five wells, no more being authorized. The remaining 73.74 acres is cut up into small tracts separately owned and has 87 producing wells. The rest of the field, with negligible exception, consists of large tracts. These 87 wells had been drilled prior to the effective date of Rule M68, up to which time the Humble had been diligent in drilling its properties in accordance with the 20-acre spacing, but had not completed such drilling. As a result, there were a number of wells it was cut off from drilling because of failure to get priorities for material under this rule. It was upon showing of such inability that the 40-acre amendment to the proration order was passed in August 1944. The Commission had granted no exceptions to the spacing rule, except those that were required to protect vested rights; that is one to each segregated tract, however small; but not more than one well on any such tract. Each of the wells in the densely drilled 73.74 acres was drilled in accordance with this rule.

The overall general picture regarding recoverable reserves and drainage as presented by Mr. Davis was that Humble's properties contained 76.5% of the recoverable reserves of the entire field; whereas, under the proration order in issue it was allowed only 71.4% of such recoverable reserves, which, if continued during the rest of the life of the field (estimated at about 27 years) would result in drainage from Humble properties to the thickly drilled portion of the townsite of some 30,000,000 barrels of Humble's oil. Neither the method by which nor the data upon which this calculation was based is questioned; but only the variableness of the conclusions or estimates deduced therefrom. The method was to take an estimated percentage of the oil in place, as the amount of recoverable oil, either under the whole field or under any particular tract therein. The first step in this method was to estimate the total volume of producing sand expressed in acre feet per surface acre. The data from which this estimate was made was derived from electrical logs of each well called Schlumbergers. Since these logs only show the sand thickness in the area occupied by the well bore, a relatively insignificant portion of the area involved, it is necessary to make the estimate by averaging the sand thickness between wells from the thicknesses shown by the adjacent well logs. This is the only possible method, and it is concededly subject to wide variation from actual underground conditions, largely accentuated by the unusually faulted condition of the field. Mr. Davis testified that the general average would be approximately correct, for the reason that overestimate in one area would be com-

pensated by underestimate in another. On the other hand, Mr. Teis testified that due to the highly faulty character of the field this averaging involved a substantial probability of error. He illustrated this by calculations from logs in a 20-acre area in the townsite having 26 wells. By taking only one central well in the tract and one well on each abutting 20 acres, and then taking all the 26 wells and adjoining offset wells, there was a difference of 15% in the result. As to this particular tract the smaller spacing gave the larger figure. He testified, however, that there was no way of determining whether the figure would be the same or reversed, if the method could be applied to the 20 or 40-acre drilled tracts.

The percentage of recoverable oil of the oil in place, was calculated from estimates of the following factors: sand porosity; shrinkage or saturation; viscosity of the oil. Sand porosity involved two factors, the actual percentage of void between the sand grains less the percentage of connate water. The first of these factors involved a laboratory test not necessary to detail, of a small sample of sand, and so far as the particular sample was concerned, the test was reasonably accurate. However, all witnesses agreed that the amount of connate water was largely a guess. Mr. Buckley testified that the percentage of connate water had no appreciable bearing upon the amount of recoverable oil except where a very high percentage (about 80%) was reached. No other witness corroborated this testimony, and it was expressly contradicted by Mr. Teis. There was a wide variability in permeability and viscosity throughout the field; and it was admitted by Hum-

ble's witnesses that estimates based upon some of these factors were subject to wide margins of error. Mr. Davis testified, however, that any such errors would be mutually compensatory under general average of the entire field.

Another substantial conflict was in estimating productivity during the life of the field. Humble's witnesses testified that they did not believe there would ever be a water drive in West Hawkins, and that the townsite 73.74 acres would be productive during the entire life of the field. Appellees' witnesses believed, on the contrary, that there would later be a water drive; but that regardless of a water drive, the life of the townsite 73.74 acres would be shortened below that of the rest of the field by some ten years due to its position on the structure, and the heavier withdrawals, which would accelerate the gas encroachment and result in earlier drowning out of that area. It was conceded, however, by Mr. Davis that no other field in the Woodbine had been drilled and produced under the same formula, or had been exhausted, and that only experience could demonstrate what would actually happen in these regards.

It was shown that the original cost of drilling and equipping a producing well in the field was approximately $20,000; that a spacing pattern of 10 acres would require Humble to drill some 500 wells in addition to those required under the 20-acre spacing; or a total original cost of some $10,000,000. There was no showing as to the operation cost of wells in production. There was no attempt on the part of appellees to show what would be the result upon the field of its development without restriction as to well

spacing or production; what would probably be either the total production from the large and small leases or the relative amount of such production as between such leases or as compared with the formula in issue. Dr. Boatright testified in this regard:

"In view of the fact that the townsite sand has as good or better characteristic as the balance of the field, has a much thicker sand section than the average of the field, and has a potential history that is better than the average of the field, and a much greater percentage of the wells than they are now getting of the production, I don't think there is any question but what under unrestricted production the township would produce more oil if the restrictions were taken off than it would produce under the present Railroad Commission order."

He testified further that he could not estimate the recovery from any particular lease, without knowing what Humble's drilling program would be under such circumstances.

It will be observed that the proration formula as to acreage is based upon surface acreage and not upon acre feet of producing sand, or recoverable reserves. Mr. Baumel testified that such a proration formula would be impractical. No suggestion was made by any of the appellees that the formula be changed from a surface acreage basis to an acre foot of sand basis. Their only suggestion as to a proper formula was to change the relative percentage from the 50-50 basis by increasing the acreage allowable to say 60% and reducing the per well allowable to 40%, which, the evidence showed could be done without waste. There was no showing as to

the minimum allowable essential to keep wells in production, or to make such production profitable.

It was also shown that the total well potentials of Humble's wells was only 59.65% of the total well potentials in the field; whereas Humble was getting under the formula 71.4% of the total allowable. The Humble contends that these figures have no bearing on the controversy for the reason that the potentials were not taken on "open flow tests," but only for the purpose of determining whether a given well would produce its allowable. The fact that Humble has only 61.82% of the total wells in the field while given 71.4% of the allowable is also discarded by Humble as having no bearing on the controversy.

While we have given in main outline the principal points of difference in the testimony between the experts introduced by the respective parties, we are assuming, for our present purposes, the correctness of the facts and the estimates and conclusions drawn therefrom as testified to by Humble's witnesses.

The general legal principles applicable to the factual situation here presented, we believe, are now well settled by the adjudicated cases. They may be briefly summarized as follows:

Oil in place belongs to the owner of the soil, but due to its fugacious nature is subject (absent conservation restrictions) to the unlimited right of capture. Both this ownership (title) and unlimited right of capture are property rights, and neither can be infringed except in a proper administration of our conservation laws. See Brown v. Humble Oil & Refining Co., 126 Tex. 293, 83 S. W. (2d) 935, Corzelius v. Harrell, 186 S. W. (2d) 961.

Rule 37 (spacing rule) and the exception thereto to prevent confiscation of property (as also waste, not here involved) as well as the limitation of production through proration, have been uniformly upheld, as valid exercises of the police power in the interest of conservation of a natural resource. Any restriction upon the number of wells drilled or the amount of production therefrom is essentially an infringement upon the right of private property, and can only be upheld as a conservation measure. In the exercise of this right of curtailment it is generally recognized that the rules and regulations adopted must, as far as practical, and within reasonable limitations, afford the several property owners a fair opportunity to produce the recoverable oil underlying their lands or its equivalent.

As a corollary to these rules, it is held that the owner of an "involuntarily" segregated tract cannot be denied the right to drill at least one well on his tract however small it may be. From which it would seem that his allowable can not be cut down to the point where his well would no longer produce (see Commission v. Mackhank, 190 S. W .(2d) 802), nor below the point where it could not be drilled and operated at a reasonable profit.

There are certain natural advantages which the small tracts have over large tracts in unrestricted production; and we think these natural advantages may properly be taken into consideration in administering the conservation laws. Oil in place, though owned by the soil owner, cannot be produced except at great cost depending upon the depth from which it must be mined. This cost places practical limita-

tions upon the right of capture which are as cogent as any other involved factor. It is not only by no means certain, but hardly within the range of reasonable probability, that in this field, where the small tracts are all concentrated in one small area, the Humble would go to the expense of drilling sufficient offset wells to prevent the townsite owners from producing as much as they will produce under the order in suit. Certainly they would not drill to the same density as the townsite tract. Whether this would be necessary to prevent all drainage does not appear. Mr. Davis testified that the townsite was draining the remote areas of the field. The mere drilling of offset wells to those in the townsite would accelerate this drainage. Just what effect unrestricted production would have on the field was not shown and probably could not be shown. However, the restriction in production and the retarded orderly withdrawals from the field, were in the interest of conservation, preventing waste, and effecting a greater ultimate recovery than would be had under unrestricted production. The large tract owners would share the larger in this benefit. The evidence does not afford the means of evaluating these factors and probably means for such evaluation could not be obtained. That they do afford a substantial advantage to the large tract owners we have no doubt. Another advantage of proration is restricting production to market demand. It is a matter of history that unrestricted production in the East Texas field reduced the market price of oil to 8 cents per barrel.

Independently of these considerations, however, there is another factor compensatory of the dis-

parity in withdrawals between large and small tracts, the means for evaluating which are more tangible; namely, the saving in cost of production under the 20-acre spacing pattern and proration order. On a 20-acre tract the cost of production of a given amount of oil is only half of that on a tract of less than one acre, which latter is four times the cost on a 40-acre tract. As illustrative of the effect of this factor the evidence shows that the saving in original cost, exclusive of operation cost, to Humble alone between drilling on a 20-acre spacing pattern and on a 10-acre spacing pattern would amount to approximately $10,000,000. To evaluate this saving it would have to be capitalized at a reasonable rate of interest and amortized over the period of the life of the field (27 years). Against this investment, at most, is the 5% of additional recoverable reserves (30,000,000 barrels of oil) the production of which would be spread out over the same 27 years.

The conservation orders of the Commission are presumptively valid, and before they can be set aside by the courts, their invalidity must clearly be shown. Judge Sharp expresses this rule in Corzelius v. Harrell, 186 S. W. (2d) 961, as follows:

"The Railroad Commission is not required in administering the oil and gas statutes to be absolutely accurate in its rules and orders. This would be impossible. It is the duty of the Commission to treat all interested parties justly and impartially, and the actions and rulings of the Commission in attempting to accomplish such results will not be disturbed by the courts unless such rules or orders are clearly illegal, unreasonable, or arbitrary. The power to make

rules rests exclusively with the Railroad Commission."

See also Sun v. Potter, 189 S. W. (2d) 482.

The responsibility for the proper administration of the conservation laws rests primarily with the Commission. What factors shall be considered, and their proper evaluation are matters exclusively within the Commission's discretion and not subject to judicial review, so long as they bear a reasonable ralation to the subject matter of the order. In the Brown case, above, Judge Sharp used this language:

"There are many factors, facts, and circumstances, which we shall not undertake to detail here, in each case and in each hearing, which must be considered, weighed, and given effect, in the fair and reasonable administration of such laws, rules, and exceptions. All questions of fact are primarily for the commission to determine."

The following is from Chief Justice Alexander's opinion in the Marrs case (Marrs v. Commission, 142 Tex. 293, 177 S. W. (2d) 941):

"The responsibility rests with the Commission to devise some scheme of proration that will conserve the oil in the field in question, and at the same time will be fair and just and will not deprive petitioners of their property. There are many and varied methods that may be adopted by the Commission to accomplish this purpose. This necessarily involves the exercise of the discretion that has been committed by the Legislature to the Commission, and it would amount to a usurpation of the Commission's power by the court, for the court to undertake to prescribe the terms of such an order. As heretofore

stated by this Court, in passing on the validity of any scheme that may be worked out by the Commission for the handling of this problem, a reasonable margin will be allowed for differences in opinion and errors in judgment."

And this from Judge Hickman's opinion in the recent case of Commission v. Mackhank, 190 S. W. (2d) 802:

"The Court cannot strike down an administrative order on the ground that the evidence heard by the Court indicated that a more equitable one could be entered."

It has never been held that recoverable reserves constitutes the only factor to be considered in determining the validity of a proration order. And so far as we are aware no proration order has ever been made in which the allowable has been allocated in proportion to the recoverable reserves. The only evidence upon this subject was to the effect that allocation upon such basis would be impracticable. Nor is it contended by appellees that such basis should be adopted. As we understand their contention, there is no complaint of the order on the ground that it divides the total allowable upon a per well and surface acreage percentage basis; but only that the 50-50 formula does not give them their share of the recoverable reserves.

We believe the Marrs case is the only one in which the validity of an oil proration order allocating the field allowable has ever been adjudicated by our Supreme Court. Other than the Danciger Case (Danciger v. Commission, 49 S. W. (2d) 837), the earlier proration cases were brought in the federal courts.

The Danciger case was dismissed by the Supreme Court without adjudication of the merits. 122 Tex. 243, 56 S. W. (2d) 1057. Well potential was recognized as an appropriate factor to be considered in determining the validity of a proration order in the Marrs case; and proration orders based on well potentials have been upheld by the federal courts. See Danciger v. Smith, 4 Fed. Supp. 236, wherein Judge Hutcheson, writing for a three-judge court, said:

"* * * unlike the orders in those cases which apportioned the allowable to the field on a per well basis rather than in accordance with the potential of the wells, so as to give each well reasonably its proportion of the allowed production, this order distributed the allowable on a potential basis in an effort to fairly allocate to each producer that portion of the production which the situation and nature of his properties entitles him to have. It is therefore plain that it cannot be said that there is anything arbitrary or unreasonable on the face of the order, either in the amount of production to which a particular field is limited or in the method of its distribution."

As above shown appellees contend that potentials can not be considered in this case because not properly taken. Conceding this point arguendo; can it be reasonably said that appellees have established the invalidity of the order when no effort has been made by them to have the effect of this factor developed. See opinion of this court in Commission v. Mackhank, 186 S. W. (2d) 351.

Waving other issues aside, however, and consid-

ering only the compensatory effect of reduced drilling cost, and this independently of reduced operating cost, we think the order was well within the discretionary powers of the Commission in making it.

In reaching this conclusion we have assumed that the independent judicial factual review rule, laid down in the Marrs case, applies, at least in proration cases; and this even to the extent of passing upon the conflicting views and theories of expert witnesses.

It is interesting to note, however, that, although the same issue of confiscation is involved in Rule 37 cases where the permits are based upon the exception "to prevent confiscation of property," the substantial evidence rule has been uniformly applied. The latest expression of the Supreme Court upon this subject is that contained in the following language from Judge Sharp's opinion in Potter v. Sun, above:

"The decision in this case may be placed on the rule that if there is any testimony of probative force to sustain the order of the Railroad Commission and the judgment of the trial court, it is the duty of the courts to uphold such order and judgment, unless they are clearly illegal, unreasonable, or arbitrary."

It would appear that in dealing with an oil field consisting of a common pool it is essential to have uniformity in geological theory applied throughout the field. The Commission would clearly not be warranted in accepting the theory of one set of experts in passing upon the rights of one leaseholder, and rejecting that theory and adopting that of another set of experts in passing upon another's rights. It is the view of the writer that to this extent, at least,

the Commission's discretionary powers should not be subject to judicial review, and the substantial evidence rule should apply.

The following is from the Federal Supreme Court's opinion in the first Rowan & Nichols case, (310 U. S. 573, 60 S. Ct. 1021, 84 L. Ed. 1368):

"Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority offensive to the Fourteenth Amendment."

The trial court's judgment is reversed and judgment is here rendered for appellants.

JAMES W. MCCLENDON
Chief Justice

Reversed and Rendered.
Filed: March 6, 1946.

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No. 1345

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In the Supreme Court of the United States

OCTOBER TERM, 1946

FLOY K. WILLIAMS ET AL, APPELLANTS

vs.

RAILROAD COMMISSION OF TEXAS ET AL, APPELLEES

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE JUDGMENT OF THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

REPLY OF APPELLANTS FLOY K. WILLIAMS ET AL TO APPELLEES' OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM

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Appellants Floy K. Williams, D. F. Williams, L. A. Bryan, Jr., Jack Kay, Paul D. Smith, R. L. Peveto, Florence Cowles Hamlett and A. L. Atkins, replying to the opposing statement and motion to dismiss or affirm filed by appellees Railroad Commission of Texas et al, show:

Summary of the Reply

Contrary to Appellees' contentions,

(1) This Court has not, in *Railroad Commission of Texas et al vs. Rowan & Nichols Oil Company*, 310

U. S. 573, 311 U. S. 614; *Railroad Commission of Texas et al vs. Rowan & Nichols Oil Company*, 311 U. S. 570; and *Railroad Commission et al vs. Humble Oil & Refining Company*, 311 U. S. 578, ruled adversely to appellants' contentions; and the question involved in the appeal is substantial.

(2) The decision of the Texas court, regardless of the effect thereon of local law, has the effect to sanction a taking of appellants' property without due process of law.

I.

This Court has not heretofore ruled adversely to appellants' contentions; and the question involved in the appeal is substantial.

Railroad Commission of Texas et al vs. Rowan & Nichols Oil Company, 310 U. S. 573, 311 U. S. 614-615; *Railroad Commission of Texas et al vs. Rowan & Nichols Oil Company*, 311 U. S. 570; and *Railroad Commission of Texas et al vs. Humble Oil & Refining Company*, 311 U. S. 578, ruled upon the validity of certain orders of the Railroad Commission of Texas applicable to the East Texas oil field. It was contended in those cases by Rowan & Nichols Oil Company and Humble Oil & Refining Company that certain allocation formulas or proration orders enforced to control distribution of the daily field allowable among the wells in the East Texas field were void, because, due to the allowable to marginal wells and failure of the Commission to give proper weight to the measurement of oil in place, to the better location of leases on the structure, to the ca-

pacity of wells to produce, and to the density of drilling on the various leases, enforcement of the orders resulted in unnecessary drainage of oil from the lands of the complaining parties. The facts with respect to the physical condition in the East Texas field, as developed in those cases, are vastly different from the facts with respect to the physical conditions in the Hawkins field. In those cases the Court declined to hold, "on the basis of conflicting expert testimony" (310 U. S. 581-582), that the action of the administrative tribunal was offensive to the Fourteenth Amendment, or to supplant "the feel of the expert" with "an independent view of judges on the conflicting testimony and prophesies and impressions of expert witnesses," or "to substitute the Court's wisdom for that of the legislative body" (311 U. S. 576-577).

In this case a different situation is presented. It is beyond controversy that the challenged proration formula results in uncompensated, **excess** drainage; it was shown by the testimony, and is admitted in the opposing statement and motion to dismiss or affirm (p. 15), and is recognized in the opinion of the Court of Civil Appeals (193 S. W. (2d) 831), that other proration formulas could be adopted which would reduce the extent of the drainage without resulting in waste of oil or gas. This case is, therefore, one in which there can be no conflict between the parties regarding the issue of **excess** drainage, or on the point that other proration formulas could be adopted which would substantially reduce the extent of the drainage without causing waste of oil or gas. In this case appellees attempt to sustain a proration

formula that results in excess drainage of oil from appellants' lands although the formula which causes such excess drainage is not necessary to prevent waste. Such a **conflict of testimony** as controlled the decisions in the above cases is not present in this case on the point which gives rise to the federal questions presented by this appeal.

In the instant case the Court of Civil Appeals stated that:

> * * * "While there was sharp conflict in the testimony upon several factual issues, there was no conflict regarding the issue of substantial uncompensated excess drainage. All the witnesses testified, and appellants (Railroad Commission and Ashcroft et al) admit in their brief, that there was such drainage, although not conceding the extent thereof as testified to by Humble's witnesses." (193 S. W. (2d) 829.)

Then, having stated that there are certain natural advantages which small tracts have over larger tracts in unrestricted production; that it is by no means certain, but hardly within the range of reasonable probability, that Humble would drill sufficient offset wells to prevent the townsite owners from producing as much as they produce under the order in suit; that certainly Humble would not drill to the same density as the townsite tracts, but "whether this would be necessary to prevent all drainage does not appear"; that just what effect unrestricted production would have on the field was not shown and probably could not be shown; that the larger tract

owners would share the larger in the benefits of conservation; and that "the evidence does not afford the means of evaluating these factors and probably means for such evaluation could not be obtained," the Court of Civil Appeals proceeded to discuss the saving in drilling and production costs resulting to Humble from the proration (193 S. W. (2d) 832-833), and then undertook to justify the challenged formula with the statement that:

> "Waiving other issues aside, however, and considering only the compensatory effect of reduced drilling costs, and this independently of reduced operating costs, we think the order was well within the discretionary powers of the Commission in making it." (193 S. W. (2d) 834.)

Elsewhere in the opinion (193 S. W. (2d) 831), the Court of Civil Appeals said that the evidence showed that the formula could be changed to increase the weight given to acreage with a reduction of the "per well" factor (which would obviously reduce the existing drainage) without causing waste.

In the opposing statement and motion to dismiss or affirm, appellees say: "It is conceded * * * that net uncompensated drainage is taking place to the townsite in substantial amounts," and that "It is true that by changing the proration order the Railroad Commission might **reduce** drainage" (p. 15, R. 2412). It is thus shown that both the Court of Civil Appeals and appellees recognize the fact of drainage and that the formula could be changed to reduce the extent of the drainage without causing

waste. (In connection with the above quoted statements, appellees attempt to justify the drainage by saying that there was testimony that the drainage was less than it would be in the absence of regulation, and to justify the failure to change the formula by saying that to change it would alter the relative rights of the parties as they would exist in the absence of restriction on production and deprive the townsite operators of the right to capture migratory oil. These statements will be discussed later in this reply.)

A fair interpretation of the opinion of the Court of Civil Appeals, aside from discussion of procedural errors, is that the Court of Civil Appeals recognized that the undisputed evidence showed that the challenged formula resulted in substantial, uncompensated, excess drainage from the larger tracts to the densely drilled townsite, and that another formula could be adopted which would reduce the extent of the drainage without causing waste; but, notwithstanding these facts, sustained the proration order on the basis that the saving to Humble in drilling and production costs resulting from proration compensated it for the drainage caused by the challenged formula. **This basis of decision did not take into account the rights of these appellants as owners of royalty oil which they are entitled to receive free of drilling and production costs.**

As to Humble, the question is: Can the drainage of large quantities of oil, resulting from an unnecessarily oppressive proration formula, be justified on the basis that Humble's losses from drainage are offset by the saving to Humble in drilling and produc-

tion costs resulting from proration? As to these appellants, who are royalty owners, the question is: Can the drainage of oil from lands in which they own royalty, caused by such an order, be justified on the basis that proration results in a saving in drilling and operating costs to the owner of the working or leasehold interest in such lands?

The contention of these appellants is that the fact, if it be a fact, that proration results in a saving in drilling and production costs to the owner of the leasehold or working interest, does not justify a formula which is not essential to the prevention of waste and admittedly results in substantial, uncompensated, excess drainage of their royalty oil; that, where it is shown that the formula results in such drainage and that another formula could be adopted which would substantially reduce the extent of the drainage without resulting in waste, the taking of appellants' property is without due process of law.

The question is grounded on the Due Process Clause of the Fourteenth Amendment; it is substantial, and neither of the *Rowan & Nichols cases* nor the *Humble case*, cited by appellees, ruled upon the question.

II.

The decision of the Texas court, regardless of the effect thereon of local law, has the effect to sanction a taking of appellants' property without due process of law.

The Court of Civil Appeals stated that "there was no conflict regarding the issue of substantial uncom-

pensated excess drainage," and that it was shown that another proration formula could be adopted which would reduce the extent of the drainage without causing waste of oil or gas. (193 S. W. (2d) 829, 831.)

Under Texas law oil in place belongs to the owner of the soil, subject to the right of capture by owners of adjacent property. *(Texas Company vs. Daugherty*, 107 Tex. 226, 176 S. W. 717; *Corzelius vs. Harrell*, 143 Tex. 509, 186 S. W. (2d) 961.) As is stated in the opinion of the Court of Civil Appeals (193 S. W. (2d) 832), "any restriction upon the number of wells drilled or the amount of production therefrom is essentially an infringement upon the right of private property, and can only be upheld as a conservation measure." In applying and enforcing the conservation laws of Texas, and particularly in adopting proration orders and allocation formulas, the law requires that the Commission take into consideration and protect the correlative rights of the persons and properties affected by such orders. *(Gulf Land Company et al vs. Atlantic Refining Company et al*, 134 Tex. 59, 131 S. W. (2d) 73, 80; *Marrs vs. Railroad Commission*, 142 Tex. 293, 177 S. W. (2d) 941, 948; *Corzelius vs. Harrell*, 143 Tex. 509, 186 S. W. (2d) 961, 968.)

In *Corzelius vs. Harrell*, the court said:

> " 'To adjust correlative rights' the Commission is authorized by this law to consider many items that relate to the production of gas, and it further provides that the Commission shall consider 'all other factors

> which are pertinent.' * * * The criterion fixed by the Legislature relating to the adjustment of correlative rights is as definite as that fixed by law to authorize the Commission 'to prevent confiscation of property' under Rule 37."

The Texas rule is that:

> * * * "every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalents in kind, and that any denial of such fair chance would be confiscation." *(Railroad Commission of Texas et al vs. Gulf Production Company,* 134 Tex. 122, 132 S. W. (2d) 254, 255; *Gulf Land Company et al vs. Atlantic Refining Company et al,* 134 Tex. 59, 131 S. W. (2d) 73, 80; *Marrs et al vs. Railroad Commission et al,* 142 Tex. 293, 177 S. W. (2d) 941, 948.)

In *Atlantic Production Company vs. Railroad Commission of Texas et al,* 85 S. W. (2d) 655, 657, the Court said:

> "Appellee is entitled, and entitled only, to be accorded an equal opportunity with surrounding lessees to recover his fair share of the recoverable oil; or, stated differently, to recover the approximate amount of oil lying in place under his lease."

The Court of Civil Appeals did not ground its decision in this case upon either a finding or holding that the proration formula here involved accorded

either the Humble or these appellants an equal opportunity with surrounding lessees to recover their fair share of the recoverable oil or to recover the approximate amount of oil lying in place under their leases as is their right under Texas law. On the contrary, it is recognized in the opinion of the Court of Civil Appeals that the owner and operator of wells drilled on lands in which appellants own royalty rights are not allowed an equal opportunity with other lease operators to recover the approximate amount of oil lying in place under such lands. The effect of the challenged formula is to deny that right to the owner and operator of wells on lands in which appellants own royalty rights, and so to take from appellants their royalty oil. The undisputed testimony from one of appellees' witnesses was that up to February 1, 1945, the drainage to the townsite had amounted to 2,000,000 barrels of oil (R., 1404).

The challenged proration formula, therefore, does not accord to appellants their property rights under Texas law. The Court of Civil Appeals attempted to meet this issue in so far as the leaseholder (Humble) is concerned by saying that through savings in drilling and production costs resulting from proration it is compensated for its drainage losses caused by the formula. That view recognizes the losses to the lease owner and its right to some character of compensation for its losses. But, what about the royalty owner? The lease owner's rights do not stand on any higher footing than the royalty owner's rights. The Court of Civil Appeals does not attempt to point out any compensation to these appellants for their losses through

drainage, unless it be said that proration results in a benefit to them. But proration results in a benefit to those who are draining appellants' lands and would do so even if they were denied by a proper formula the drainage benefit which they get as a result of the existing formula. Where the formula concededly results in drainage from appellants' lands and other formulas could be adopted which would reduce the drainage and accomplish the purpose of preventing waste, a denial to appellants of their property rights under Texas law is shown, and the taking is without due process of law. This taking is sanctioned by the opinion and judgment of the Court of Civil Appeals, and it is not founded upon Texas law but is contrary to the Texas law and the Due Process Clause of the Fourteenth Amendment.

In the opposing statement and motion to dismiss or affirm, appellees attempt to meet this situation on three bases:

(1) That appellants are petitioning the Court to substitute its discretion for the discretion of the Commission (p. 10, R. 2407);

(2) That there was no definite evidence as to any one of the royalty owners whether said royalty owner would during the life of the field, considering his total interest in the various leases, be permitted to recover more or less than the recoverable reserves originally in place (p. 11, R. 2408); and

(3) That appellants ignore existence of the rule of capture as a property right and, in effect, contend that in enforcing restricted drilling and production, the Commission must "change the Texas law of prop-

erty in oil and gas so as to restrict each operator to the oil in place beneath his land" (pp. 16-17, R. 2413-2414).

Appellants do not petition the Court to substitute its discretion for the discretion of the Commission. They asserted that the proration formula with the resulting drainage is not necessary to prevent waste; and in support thereof offered proof that another formula could be adopted which would substantially reduce the drainage without resulting in waste. Appellants' suit was not an attempt to have the Courts do that which the Commission should have done, but a suit to enjoin the enforcement of the existing order, leaving the Commission free to adopt another formula which would reduce or eliminate the inequities and the confiscatory effect of the challenged formula.

The evidence (R., 952-953) was to the effect that all of the leases in which these appellants hold royalty interests were suffering drainage as a result of the challenged formula; and that the formula did not allow the wells on these leases to produce in the same proportion as wells in the townsite are allowed to produce. (R., 1461-1462.)

There is no attempt by appellants in this case to require that anything be done which would deprive the townsite operators of the benefits of the rule of capture or to force the Commission to change the law of property in oil or gas, as suggested by appellees in their opposing statement and motion to dismiss or affirm (pp. 15, 16-17, R. 2412-2414). The effect of the rule of capture is to give a well owner title to the oil which is brought to the surface through his well.

It applies to unrestricted production and also to production under proration or conservation laws. In the case of unrestricted production the parties are allowed to fend for themselves. They can exercise rights under the rule both offensively and defensively,—offensively, by drilling and producing wells for the purpose of draining oil from their neighbors' lands; defensively, by drilling and producing wells to prevent their neighbors from draining oil from their lands. Under proration or conservation laws, the right of property owners to drill and produce wells is restricted. The exercise of what otherwise would be their rights under the rule of capture is curtailed, but the oil which is brought to the surface through a well still belongs to the well owner. The fact of regulation implies a necessity to recognize and protect correlative rights in the ownership of oil in place. The Texas courts have met this situation by establishing a Texas rule of property to the effect that each owner must be accorded an equal opportunity with surrounding lease owners to recover his fair share of the recoverable oil; or, stated differently, to recover approximately the amount of oil lying in place under his lease. Under this rule of property, it becomes the duty of the Commission in promulgating proration formulas to protect the correlative rights of property owners. As stated by the Court of Civil Appeals in the instant case, any restriction upon the amount of production is essentially an infringement upon the right of private property and it can only be upheld as a conservation measure. Where the testimony shows,

as in this case, that the formula adopted by the Commission results in unnecessary and uncompensated drainage and that other orders could be adopted which would prevent waste and reduce the amount of such drainage, it is demonstrated that the property rights of the lease and royalty owners, as existing under Texas law, have not been protected and, on the contrary, have been trespassed upon to the extent of an unlawful taking of property.

It was pointed out above that appellees state (p. 15, R. 2412) that there was testimony that the amount of drainage to the townsite was less than it would be in the absence of regulation. This was said in an attempt to defend the admitted drainage. The testimony of the witness to the effect that in his opinion Humble will recover a greater percentage of the oil than it would without restrictions, quoted in support of the statement, does not exactly support appellees' conclusion. In any event this witness on cross-examination testified (R., 1402-1043) that he did not know how many wells Humble would drill if there were no restrictions on drilling, and without that information it would be impossible to estimate how much oil Humble would produce from the field if there were no restrictions on drilling and production.

It is also pointed out above that in defense of the failure to adopt a formula that would reduce the extent of the drainage, appellees state in the opposing statement and motion to dismiss or affirm that "this would amount to altering the relative rights of the parties as they existed under unrestricted conditions and thereby depriving townsite operators of the right to capture migratory oil." It is sufficient

answer to this contention to point out that the Court of Civil Appeals said (193 S. W. (2d) 832): "Just what effect unrestricted production would have on the field was not shown and probably could not be shown."

Proration necessarily limits the extent to which the right to drill wells and capture oil may be exercised. The very fact that it does so limit the exercise of a right otherwise existing demands that the correlative rights of operators be protected and that one operator be not reduced to a state of helplessness while his neighbor takes his property under the protection of a proration order. A formula that results in drainage and that is unnecessary to prevent waste cannot be defended on the basis that the person who receives the benefit of the drainage would have right thereto under full play of the rule of capture in unrestricted production. Neither can it be said that such a formula cannot be corrected to reduce the unnecessary drainage because thereby the party benefited by the drainage would be denied a right which he would have under unrestricted production, for that would dispute the right to enforce proration of production and deny existence of a duty to protect correlative rights when and where proration is enforced.

Respectfully submitted,

DAN MOODY,
Austin, Texas,
Attorney for Appellants
Floy K. Williams et al.

Service of the foregoing reply to appellees' opposing statement and motion to dismiss or affirm, by delivery of copies thereof to the undersigned, is acknowledged this the 12th day of May, 1947.

Price Daniel, Attorney General of Texas

Fagan Dickson, First Assistant Attorney General of Texas

Attorneys for Appellees Railroad Commission of Texas, et al

James P. Hart,

Attorney for Appellees Ashcroft et al.

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MAY 7 19[illegible]
CHARLES ELMORE [illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 1344-1345

HUMBLE OIL & REFINING COMPANY, ET AL.,
Appellants,

vs.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellees

ON APPEALS FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEES' OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM

PRICE DANIEL,
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ON APPEALS FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEES' OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM

The appellees, the Railroad Commission of Texas and its members and the Attorney General of Texas, and Charles F. Ashcroft, et al., respectfully submit this statement and motion to dismiss or affirm, under Rule 12 of the Rules of this Court, and say:

Summary Statement of Appellees' Contentions

(1) *The questions presented by the appeal are not substantial, because they have already been settled adversely to appellants by the decisions of this Court in Railroad*

Commission v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 311 U. S. 614; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Railroad Commission* v. *Humble Oil & Refining Co.*, 311 U. S. 578.

(2) *The Texas courts having decided that appellants' property rights, as determined by the Texas law of property, are not being denied or confiscated, the decision of the Texas courts rests upon an adequate and substantial non-federal ground.*

This case presents the question of the validity under the Fourteenth Amendment of a proration order of the Railroad Commission for the Hawkins field dividing the allowable production of oil among the various operators on what is popularly known as a 50-50 basis—that is, 50% per well and 50% on the basis of acreage. Appellants' essential complaint against the proration formula is that it gives too much weight to the per-well factor and not enough weight to the acreage factor, with the result that the appellants on their large tracts are allowed to recover less, and the townsite operators on their small tracts are permitted to recover more, than they would recover if the production were allocated in proportion to estimates of recoverable oil in place beneath their respective tracts.

It is the appellees' position that under earlier decisions by this Court, the Railroad Commission's order is reasonable and well within the limits of the Railroad Commission's proper discretion, and that, the Texas courts having decided that none of appellants' property rights are being denied to them, the case turns on a question of Texas property law on which the decision of the Texas courts is final.

I

The Questions Raised by Appellants Have Been Decided Adversely to Them by Earlier Decisions of This Court

An examination of the opinions in the *Rowan & Nichols* and *Humble* cases, cited above, and a comparison of the facts in those cases with the facts in this case, will show that substantially the same attacks were made there upon proration orders much less favorable to the owners of large tracts than the order in this case, and that this Court specifically rejected the claims of unconstitutionality there presented.

Earlier Decisions by This Court

1. *First Rowan & Nichols Case*

In the first *Rowan & Nichols* case, 310 U. S. 573, the order, relating to the East Texas field, was substantially "on a flat per well basis" (See 310 U. S. at pp. 578, 582). The validity of the order under the Fourteenth Amendment was specifically attacked (See 310 U. S. at p. 577). The complaint against the order was that it permitted "other leaseholders, more leniently treated, to capture oil at a more rapid rate than is possible for the respondent, thereby draining away oil which underlies respondent's leased lands" (See 310 U. S. at p. 578), and that the result of the order was to give "a constitutionally inadmissible advantage to smaller and more densely drilled tracts as against those owned by respondent" (See 310 U. S. at p. 582).

Rejecting these claims of unconstitutionality, and recognizing the implications of "the rule of capture" as an integral part of the law of property in oil and gas in Texas, this Court held that "a flat per well allowance to these producers was not an unnatural answer to the problem" (See 310 U. S. at p. 583) and that, "It is not for the federal

courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better" (See 310 U. S. at p. 584).

2. *Second Rowan & Nichols Case*

In the second *Rowan & Nichols* case, 311 U. S. 570, the court was confronted with a proration order, again relating to the East Texas field, which was somewhat more favorable to the larger tracts than the order involved in the first case. Instead of being about 98% on a per-well basis, as in the first order, the second order was about 75% on a per-well basis and 25% on other factors, including acre feet of sand (See 311 U. S. at p. 574). Rejecting again the contention that the small tracts were unduly favored and that the per-well allowable "constituted an illegitimate discrimination against high producing and thinly drilled areas" (See 311 U. S. at p. 574), this Court reversed the judgment of the lower court and ordered the dismissal of the complaint. In the course of its opinion, this Court pointed out the following considerations as being relevant to the problem of the small tracts (See 311 U. S. at pp. 574-575):

> "The surface is often divided into small tracts, and the Commission, acting under the authority of the Texas statutes, has permitted the drilling of wells by small owners in order to prevent practical forfeiture of their interests. Small producers have investments in existing wells with low capacities, and these wells need a minimum daily production to justify their enterprise. In addition to all this, any scheme of proration duly mindful of all those considerations, hardly mathematically commensurable, which constitute the total well-being of a society, must assure the continued operation of a sufficient number of wells for an adequate exploitation of the state's oil resources."

3. *The Humble Case*

The *Humble* case, 311 U. S. 578, was a companion case to the second *Rowan & Nichols* case, involving the same proration order, and the Court disposed of it in a brief opinion, referring to that case.

The Present Case

1. *Summary of Proceedings in State Courts*

Following the repulses of the attacks on proration orders in the federal courts in the *Rowan & Nichols* and *Humble* cases, the forum for the settlement of the controversy over proration was shifted back to the Texas courts. In *Marrs* v. *Railroad Commission,* 142 Tex. 293, 177 S. W. (2d) 941, the Supreme Court of Texas set aside a proration order for the McElroy field because the order did not, in the opinion of the court, give proper weight to (a) the potential productivity of the complainant's wells under unrestricted conditions and (b) to the relative proportion of the recoverable reserves of oil in place beneath their tracts.

Shortly after the decision in the *Marrs* case, the present case was brought by Humble and some of its royalty owners attacking the proration order in the Hawkins field. The District Court after a lengthy trial, set the proration order aside. The Court of Civil Appeals, after holding that procedural errors had occurred in the District Court which otherwise would have required a new trial, held further that the evidence, when viewed most favorably to the Humble and its royalty owners, did not justify the setting aside of the Railroad Commission's order, under the holding in the *Marrs* case, and therefore reversed and rendered the judgment of the District Court. *Railroad Commission* v. *Humble Oil & Refining Co.,* 193 S. W. (2d) 824. Applications for writs of error were made to the Supreme Court of Texas

by Humble and its royalty owners. In the meantime, the Supreme Court of Texas, after the decision in the *Marrs* case, in two decisions involving the well-spacing rules, held that orders of the Railroad Commission of Texas under the oil and gas conservation statutes will not be set aside by the courts if such orders are supported by substantial evidence showing such orders to be reasonable. *Thomas* v. *Stanolind Oil & Gas Co.*, 198 S. W. (2d) 420; *Trapp* v. *Shell Oil Co., Inc.*, 198 S. W. (2d) 424 (Original opinions, May 15, 1946; motions for rehearing overruled November 27, 1946).[1] On December 18, 1946, the Supreme Court of Texas, in the present case, denied the applications for writs of error with the docket notation, "Refused. No reversible error" (R. 2231), the judgment reciting that the Supreme Court of Texas finds "that the applications present no error which requires a reversal of the judgment of the Court of Civil Appeals . . ." (R. 2067, 2103).

The appellants, Floy K. Williams, et al., are incorrect in stating on page 12 of their Jurisdictional Statement (R. 2185) that the applications for writs of error were denied with the simple notation, "Refused." This is material under the Texas practice, because of the provisions of Rule 483 of the Texas Rules of Civil Procedure (Vernon's 1946 Supplement), which provides in part as follows:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' *In all cases where the Supreme Court is not satisfied with the*

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[1] Compare the decisions of this Court applying the substantial evidence rule to cases involving attacks on orders of federal administrative agencies. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *Federal Security Administration* v. *Quaker Oats Co.*, 318 U. S. 218; *Federal Communications Commission* v. *WOKO, Inc.*, 328 U. S. — (No. 65, October Term, 1946, decided December 9, 1946).

> *opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal,* the Court will deny the application with the notation '*Refused. No reversible error.*' "[2]

The action of the Supreme Court of Texas in the present case therefore is not an endorsement by the Supreme Court of all of the principles of law announced or relied upon by the Court of Civil Appeals. In fact, the notation made by the Supreme Court of Texas necessarily means that in some respects the Supreme Court of Texas did not approve of the reasons given by the Court of Civil Appeals in its opinion, although the Supreme Court of Texas did agree with the result reached by the Court of Civil Appeals. All that can be said with certainty is that upon the whole record the Supreme Court of Texas decided that as a matter of law the evidence showed that the Railroad Commission's order was within the discretionary powers of the Railroad Commission and should not be set aside. The decision of the present case by the Texas courts cannot be said to rest (as appellants contend, Humble's Jurisdictional Statement, pp. 17, 21, R. 2138, 2142; Floy K. Williams, et al., Jurisdictional Statement, p. 10, R. 2183) upon any single declaration of law by the Court of Civil Appeals, such as its reference to the compensatory factor of the saving of drilling costs to the Humble, as supporting the present order; but, on the contrary, the validity of the order as sustained by the Texas courts must be said to rest upon its reasonableness in the light of the entire record and upon a consideration of all relevant factors. We shall discuss the order upon this basis, in view of the earlier decisions of this Court.

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[2] All emphasis in this motion is ours.

2. *Comparison of Facts in This Case with Facts in Earlier Decisions of This Court*

The essential complaint asserted by the Humble and its royalty owners is the same as the complaint in the cases previously decided by this Court: viz., that the order allocates too much of the allowable on a per-well basis rather than on the basis of acreage or acre-feet of sand, resulting in a recovery by wells on small tracts of more than their fair share of the recoverable oil. The clear applicability to the present case of the reasoning followed by this Court in its previous decisions is shown by the following comparisons:

(a) *Approximate percentage of allowable production distributed on a per well basis:*

First *Rowan & Nichols* case—98%
Second *Rowan & Nichols* case—75%
Present case—50%

(b) *Approximate percentage of allowable production distributed on an acreage basis:*

First *Rowan & Nichols* case—none (the allowable above the flat per well allowable being distributed on the basis of 2.32% of the hourly potential capacity of each well).

Second *Rowan & Nichols* case—less than 25% (the balance of the allowable above the 75% distributed on a per-well basis being distributed on a formula involving well potentials, sand thickness, and bottom-hole pressure, as well as acreage).

Present case—50%.

(c) *Differences in allowables granted to wells on small tracts and large tracts:*

First *Rowan & Nichols* case—minimum allowable to all wells capable of making it—20 barrels; highest allowable, determined by well potential and not by acreage of tract—25 barrels (See Record in that case, No. 681, October Term, 1939, p. 983).

Second *Rowan & Nichols* case—minimum allowable to all wells capable of making it—20 barrels; highest allowable—50 barrels (See Record in that case, No. 219, October Term, 1940, p. 325).

Present order—allowable to well on smallest tract—46 barrels; allowable to well on 40 acres—184 barrels.

To summarize, the wells on larger tracts fare much better under the formula in this case than they would have fared under the orders involved in either of the *Rowan & Nichols* cases. The *per well factor,* which favors the smaller tracts, is only 50% in this case as compared with 98% in the first *Rowan & Nichols* case and 75% in the second *Rowan & Nichols* case; the *acreage factor,* which favors the larger tracts, is 50% in this case, as compared with no allowable on this basis in the first *Rowan & Nichols* case and less than 25% in the second *Rowan & Nichols* case; and the wells on the smallest tracts receive only 25% of the allowable of wells on the largest tracts in this case, whereas in the first *Rowan & Nichols* case the wells on the largest tract might or might not receive any more than the well on the smallest tract, depending on the potential of the well, but in no event would a well with the minimum allowable receive less than 80% of the maximum well allowable, and in the second *Rowan & Nichols* case, the minimum well allowable was not less than 40% of the allowable granted to the well having the largest acreage and all other factors in its favor.

Nor is there any essential difference between the basic contentions of the appellants here and the claims of the complainants in the earlier cases. In the first *Rowan & Nichols* case, this Court states the complainant's contention as follows (310 U. S., at p. 578):

"Only an allocation based on acre-feet of sand or its equivalent would be a reasonable means of measuring the oil in place beneath the respondent's leases; and

> any formula failing to do this takes respondent's property without due process of law."

In the present case, the suit was brought by Humble Oil & Refining Company, seeking a judgment "decreeing void and invalid" any orders of the Railroad Commission "which deny to Plaintiff the right to produce substantially the total daily allowable that the recoverable oil in and under its property bears to the recoverable oil in the field . . ." (R. 12-13).

The plaintiff interveners, Floy K. Williams, et al., who are royalty owners in Humble leases, adopted the allegations in the Humble's petition (R. 17) and likewise prayed that the court decree "void and invalid" any rules or regulations of the Railroad Commission which deny to the operators of wells on interveners' said properties "the right to produce substantially the proportion of the total daily allowable that the recoverable oil in and under the interveners' several properties bears to the recoverable oil in the field . . ." (R. 23).

There is no substantial difference between the claim that proration should be on the ground of acre-feet of sand and the claim that it should be on the basis of estimates of recoverable oil, because the estimates of recoverable oil relied upon by the appellants in this case were simply arrived at by multiplying the estimated number of acre-feet of sand beneath a lease by a constant "recovery factor" of 500 barrels per acre-foot (R. 574-575). In other words, any proration order, to be in proportion to recoverable reserves as estimated by appellants, would also have to be in proportion to their estimates of acre-feet of sand.

As in the *Rowan & Nichols* cases, the estimates of "reserves" and "drainage" are uncertain and conjectural at best. Many uncertain factors are involved, as stated in the opinion of the Court of Civil Appeals. The Humble's

present estimates of recoverable reserves vary by 21% from their original estimates made soon after the field was first opened (R. 930). Mr. Davis, the Humble's chief geologist, admitted that his method of calculating reserves and drainage had never been verified as against actual production so as to tell whether it was 20% or 30% or 50% wrong (R. 880). With regard to recoverable oil in any lease, Mr. Davis admitted that an estimate which was only 20% or 30% above or below the true facts would be "reasonably close" (R. 841-842). This may be contrasted with the fact that Humble's percentage of the allowable is only about 5% less than its estimates of its percentage of the total reserves (71.4% as against 76.5%). Mr. Davis furthermore admitted that the calculations appearing in Humble's exhibits, where "drainage" is calculated down to the exact barrel, are merely "a matter of accounting" (R. 628) and Mr. Davis furthermore admitted that in figuring the "drainage" on any lease, *he could easily be wrong in his estimates by a million barrels, one way or the other* (R. 632-633). These inherent uncertainties in calculations and estimates are not due to any want of experience or ability on the part of Humble's experts, but to the fact that estimates of this kind cannot be made except within very wide limits of possible errors, even by the most competent experts.

Carried to its logical conclusion, appellants' contention would mean that the townsite operators would be permitted to produce currently and ultimately only in proportion to estimated reserves in place. This would mean that the allowable production of a well on a small townsite tract would be only about one-half of one barrel per day (R. 653) and this allowable would not, of course, be sufficient to pay expenses (R. 655). In the state courts, and also apparently in this Court, the appellants have shrunk from carrying their argument to its logical conclusion and have suggested

that the proration order would be valid if the acreage factor was increased to say 60% and the per well factor reduced to say 40% (See Humble's Jurisdictional Statement, p. 13, R. 2134; and Floy K. Williams, et al., Jurisdictional Statement, p. 10, R. 2183). After all is said and done, therefore, the present suit is one where appellants have asked the courts to substitute their discretion for the discretion of the Railroad Commission and, in effect, to direct the Railroad Commission to add a little more weight to the acreage factor in its formula, thereby further restricting the townsite operators and further increasing the allowable of the Humble wells. The state courts have held that this is a matter which is properly within the discretion of the Railroad Commission and is not a matter for judicial interference. We can see no reason for this Court to depart from the rule which it stated in the second *Rowan & Nichols* case (311 U. S., at p. 576), that, ". . . —it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses."[3]

Other considerations are referred to in the opinion of the Court of Civil Appeals, which support the reasonableness of the Commission's order. A factor which has universally heretofore been recognized as being proper in proration formulas is *the number of wells* on each lease. The cost of the drilling of these wells is a large part of the investment which is necessary in order to recover the oil from its subterranean reservoir. Humble has drilled only 61.82% of the wells in the field, but it is permitted to recover 71.4% of the total allowable, or approximately 10% more than it

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[3] Compare the statement by the Supreme Court of Texas in *Trapp* v. *Shell Oil Co.*, 198 S. W. (2d) 424, 432: "In such an appeal it is not for the trial court to substitute its judgment for that of the Railroad Commission on controverted issues of fact."

would be enttiled to receive on a pre-well basis of allocation (R. 761, 1260). By reason of the proration formula, the Humble on its large leases is receiving for each of its wells as much as four times the allowable permitted to the townsite wells for each dollar invested in drilling costs. Based on the figures given in Humble's Exhibit No. 4 introduced at the trial (R. 1848), the Humble, under conditions existing at the time of the trial, would receive ultimately an average estimated production of about 1,310,000 barrels of oil per well outside of the townsite, as contrasted with an estimated 470,000 barrels per well approximate ultimate recovery from wells in the townsite.

Another factor which, as the Court of Civil Appeals points out, has always been considered as a proper factor in proration formulas is the *potential capacities of the wells* involved. The official Railroad Commission records show that the Humble wells have only 59.63% of the total well potentials in the field (R. 1261), although Humble is permitted to produce 71.4% of the total allowable from the field, or about 12% of the total allowable more than it would be able to produce if the allowable were distributed on the basis of the potentials of the wells.

3. *Humble's Royalty Owners*

Some of Humble's royalty owners, who are the appellants Floy K. Williams, et al., intervened in the suit in the District Court, adopted the Humble's pleadings (R. 17), and prayed for substantially the same relief as Humble.

Based on the method of calculating "drainage," hereinafter referred to (p. 14), the Humble experts testified that such Humble leases, in which these royalty owners have interests, would not recover the equivalent of the estimated recoverable oil originally in place beneath these leases. The Humble witness was not able to say, however, which of

the leases of these parties would not recover the equivalent of his estimate of the recoverable oil in place (R. 911), although he thought that "most of them" would not recover this amount of oil (R. 911). However, there was no definite evidence as to any one of the royalty owners whether such royalty owner would, during the life of the field, considering his total interests in various leases, be permitted to recover more or less than the recoverable reserves originally in place. On at least two of these leases (Slaughter and Henry leases) the evidence shows lower pressures than in the townsite and the probability that oil is being drained towards these leases instead of away from them (R. 1050).

Actually, the major part of such drainage as will take place will be between Humble leases, due to the migration of oil caused by the expansion of the gas cap as oil is produced. For example, Humble's Exhibit No. 12 (R. 1865) is a table of estimated "losses" of oil by certain Humble leases, which estimated losses total about 60,000,000 barrels, but the same table shows that the drainage to the townsite (including the Humble's 21 wells in the townsite) is estimated at about 30,000,000 barrels. Since it is undisputed that Humble owns practically all of the leases or property outside of the townsite, it is evident from this table that such drainage as will take place will go largely from one Humble lease to another, and not to the townsite.

Dr. Boatright testified that "there is very little, if any, migration from the plaintiff-interveners' leases to the townsite at the present time, and under present distribution of pressure," and that "if we consider the production that has occurred from plaintiff-interveners' leases, together with the oil that is probably in place there today, they have substantially the same amount, or will recover substantially the same amount of oil as they would have recovered under original conditions—that is the total quantity" (R. 1251).

Considering the evidence as a whole, while there was evidence of drainage to some extent to the townsite, there was no evidence that any of the plaintiff interveners would suffer net loss or damage, considering his or her interest in various leases in the field. There was never any specific proof as to the exact nature of the interests which the plaintiff interveners owned in the field, except generally that they owned royalty or other similar interests in Humble leases. In this connection, attention is called to the fact that there has never been any attack upon the spacing rule, which provides for the drilling of one well to 20 acres, except where separate ownership of smaller tracts requires denser drilling. It may be that it would be to the interest of the royalty owners to have the Humble drill its leases more densely, if they have any right to make such requirement under their leases. However, it affirmatively appears that no effort has ever been made to have the Railroad Commission amend the spacing rule to permit closer drilling on large tracts (R. 1766).

Finally, it is submitted that the validity of a proration order must be judged by its over-all effect rather than its effect upon a particular lease or group of leases. A proration order must necessarily be applied to an entire oil field.

After discussing some of the complexities involved in devising and applying spacing and proration rules, this Court said in *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 319:

> "For these, and many other reasons based on geologic realities, *each oil and gas field must be regulated as a unit for conservation purposes.*"

It is impossible to devise any plan which may not in particular instances result in inequalities. Proration orders must be judged by a standard of general fairness of the method of allocation. We submit that the reasoning of

Mr. Justice Holmes in the case of *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 434, is in point:

> "A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvements is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding facts should invalidate an assessment. *Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things.* And this has been the implication of the cases."

Unless the foregoing general principle is followed in cases of this kind, it is submitted that the application of proration rules will be practically impossible. Regardless of the general fairness of a proration order, some owner of a small fractional interest in some tract, acting on his own motion or jointly with the oil company which is dissatisfied, might be able to show that by some standard the particular lease in which he is interested is not recovering the amount of oil which it should recover. If this were taken as the sole test of the validity of the proration order, then it might easily happen that some oil company, acting through a royalty owner or a person having a joint working interest with it in a particular lease, might be able to have the proration order set aside, although such order, when considered with regard to the field as a whole, or the leases of the oil company as a whole, is eminently fair and just. It

is submitted that there could be nothing more destructive of uniformity and fairness of administrative action.

It is submitted, therefore, that Humble's royalty owners present essentially the same case as Humble, and that their contentions do not afford substantial constitutional grounds for nullifying the Railroad Commission's action.

II

The Decision of This Case Rests on an Adequate Non-federal Basis

The appellants' contentions with regard to drainage are merely one aspect of their contentions that proration must be on the basis of estimates of recoverable reserves in place. The principal witness offered by the appellants to prove the existence of drainage was Mr. Morgan Davis, Chief Geologist for the Humble, who testified that he calculated drainage in the following manner (R. 669):

> "Now, the drainage was calculated this way: I took the *percentage of the field allowable* that these Townsite leases now have, and subtracted from that the *percentage that they owned in the original recoverable oil,* and, therefore, assume is owned in the present reserve, which gave another percentage figure, and *multiplied that times the field reserve,* which came out with *the amount of oil drained.*"

The respondents did not admit that the method of calculation of drainage used by the appellants was the proper method of calculating such drainage, nor did they admit that the amount of drainage estimated by the Humble to the townsite would actually take place. It was conceded, as stated in the opinion of the Court of Civil Appeals, that net uncompensated drainage is taking place to the townsite in substantial amounts, but it was shown by the uncontradicted testimony of the experts testifying for respondents that

the amount of such drainage was less than would have existed in the absence of any regulation by the Railroad Commission, if each operator were free to fend for himself. In this connection, Dr. Byron B. Boatright testified as follows (R. 1264):

> "My opinion is that under the present proration schedule the Humble leases will obtain a greater percentage of recoverable oil from the Hawkins Field than they would have obtained had the field been allowed to produce without any restrictions whatever."

Upon cross-examination, Dr. Boatright testified that in speaking of unrestricted conditions, he meant production without restrictions either as to the number of wells which could be drilled or as to the amount of oil which could be produced from any well (R. 1402). He further explained that his opinion was based upon the proposition that the townsite, being located in the very best portion of the field, and with very thick and permeable sands, and with wells having very high potentials, under unrestricted conditions would be able to recover "more oil if the restrictions were taken off than it would produce under the present Railroad Commission order" (R. 1265).

The proration order of the Railroad Commission therefore does not *cause* drainage, since drainage would take place under unrestricted conditions. It is true that by changing the proration order the Railroad Commission might *reduce* drainage, but this would amount to altering the relative rights of the parties as they existed under unrestricted conditions and thereby depriving townsite operators of the right to capture migratory oil.

This Court in the *Rowan & Nichols* cases took notice of the fact that the Texas law of property in oil and gas includes not only the rule of ownership in place, but also the rule of capture, which is recognized as a property right. (See 310 U. S., at p. 580.) This rule of property was

stated by the Supreme Court of Texas in *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 940, as follows:

> "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership from oil and gas in place should be considered in connection with *the law of capture.* This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and *this is a property right.*"

More recently, the Supreme Court of Texas has reaffirmed the same proposition as follows, in the case of *Corzelius* v. *Harrell*, 143 Tex. 509, 186 S. W. (2d) 961, 964:

> "The rule in this State recognizes ownership of oil and gas in place, and gives the lessee a determinable fee therein. It is also held that such rule should be considered in connection with *the law of capture, which is recognized as a property right*, and both rules are subject to regulation under the police power of this State."

Appellants in this case ignore the existence of the rule of capture as a property right under the decisions of the Supreme Court of Texas and thereby appellants rest their case upon a false premise. Their whole case is based upon the proposition that a denial to them of a recovery in proportion to the estimated oil in place beneath their leases is a denial of their property rights. The Texas courts, in this case, as in other cases, have held that this is not a correct statement of the appellants' property rights. Texas property law does not guarantee to Humble and its royalty owners the oil in place beneath its leases or insure it against drainage. If the owners of townsite properties under unrestricted and unregulated conditions, by virtue of favorable location upon the structure, would have been able to drain oil from other properties, then the Texas courts have held that this natural advantage is a property right and that

the Railroad Commission, in allocating the allowable production under restricted and regulated conditions, must take this property right into account. For example, in *Railroad Commission* v. *Magnolia Petroleum Co.*, 169 S. W. (2d) 253, it was held by the Texas Court of Civil Appeals that it would be confiscatory to deny to the oil company the right to share in the migration of oil which would naturally move to its lease by reason of physical forces in the reservoir, and that the Commission could not limit it to a recovery merely of the oil in place beneath its lease.

The effect of the argument made by Humble and its associates is that they contend that the Railroad Commission of Texas must, in enforcing restricted drilling and production, change the Texas law of property in oil and gas so as to restrict each operator to the oil in place beneath his lease. The Texas courts have held that this is neither necessary nor proper under the Texas statutes nor under the Texas law of property. On the question of the extent of the appellants' property rights in oil, the holding of the Texas court is final. In *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651, 655, 657, this Court said, speaking through Mr. Justice Stone:

> "There being no question of evasion of the constitutional issue, . . . this court on writ of error must accept as final the ruling of the state court of last resort on all matters of state law. . . .
>
> "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. . . . It is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be nonexistent.
>
> "We accept as conclusive the state court's view of the nature of the rights of riparian owners. We

therefore find in the refusal of the Commission to grant the permit no denial of the property rights of plaintiffs and hence no violation of the Fourteenth amendment."

See also *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540.

It is generally conceded that by the joint operation of the well-spacing and proration orders, a larger total recovery of oil will be achieved. Humble and its associates do not assert that they will recover a *smaller amount* of oil than they would have recovered in the absence of any restriction by the Railroad Commission. Nor, on the other hand, do they assert that *the percentage of the total recovery* which they now receive is less than the proportion which they would have received under unrestricted conditions. What they in effect ask for is, first, that the property right of small operators to capture migratory oil should be nullified, and, second, that substantially all of the benefits resulting from conservation regulations be handed over to the owners of large tracts. Since Humble and its associates are not receiving less oil than they would receive under unregulated conditions, nor a smaller proportion of the total recovery, their property rights under the Texas law are not being denied to them. This case therefore rests upon an adequate nonfederal ground, and, under established practice, the appeal should be dismissed. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157; *Utley* v. *City of St. Petersburg*, 292 U. S. 106.

Conclusion

Although the appellants have "formally drawn in question" the validity of the Railroad Commission's proration order under the Fourteenth Amendment, it is submitted that this Court should dismiss or affirm the case because "it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in

character" (See *Zucht* v. *King*, 260 U. S. 174, 176) because (1) the questions raised by the appellants have been so "explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy." (See *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311), and (2) "the decision of the state court sought here to be reviewed was based on a nonfederal ground adequate to support it." (See *Bell Telephone Co. of Pennsylvania* v. *Van Dyke*, 296 U. S. 533, 534.)

WHEREFORE, appellees, the Railroad Commission of Texas and its members and the Attorney General of Texas, and Chas. F. Ashcroft, et al., respectfully pray that the appeal be dismissed or that the judgment of the Court of Civil Appeals of Texas be affirmed upon this motion.

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No. 1345. WILLIAMS ET AL. *v.* RAILROAD COMMISSION OF TEXAS ET AL. Appeals from the Court of Civil Appeals, 3d Supreme Judicial District, of Texas. June 2, 1947. *Per Curiam:* The motion to affirm is granted and the judgments are affirmed. *J. A. Rauhut, Nelson Jones, Norman L. Meyers, Rex G. Baker* and *R. E. Seagler* for appellant in No. 1344. *Dan Moody* for Williams et al., appellants in No. 1345. *Price Daniel,* Attorney General of Texas, and *Fagan Dickson,* First Assistant Attorney General, for the Railroad Commission of Texas et al., and *James P. Hart* for Ashcroft et al., appellees. Reported below: 193 S. W. 2d 824.